Office Supreme Court, U.S.
FILED
JAN 12 1967
JOHN F. DAVIS, CLERK

No. 966

IN THE

Supreme Court of the United States

October Term, 1966

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
AND ITS LOCAL UNION 2958,

Petitioners,

v.

UNITED STATES OF AMERICA
AND
UNION CARBIDE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BERNARD KLEIMAN
10 South LaSalle Street
Chicago, Illinois
ELLIOT BREDHOFF
MICHAEL GOTTESMAN
GEORGE COHEN
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

NATHAN LIPSON
ALFRED LAWSON
1500 Commonwealth Building
Pittsburgh, Pa. 15222

Attorneys for Petitioners

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutory Provisions Involved	3
Statement of the Case	6
Facts Preceding the Institution of Suit	6
Proceedings in the District Court	7
Proceedings in the Court of Appeals	9
Reasons for Granting the Writ	12
Conclusion	36
Appendix	
Opinion of District Court	37
Judgment of Court of Appeals	39
Opinion of Court of Appeals	39

TABLE OF CITATIONS

Cases

NLRB *v.* Drivers Local Union, 362 U. S. 274 (1960) 22, 30

NLRB *v.* Fruit & Vegetable Packers, 377 U. S. 58 (1964) 22, 30

United States *v.* General Electric Co. (S.D. Ohio, Civil No. 3350, unreported, 1966) 17, 31

United States *v.* International Association of Machinists (Republic Aviation Co.) (E.D.N.Y.) Civil No. 62-C-662, unreported, 1962) 17, 31

United States. *v.* International Longshoremen's Ass'n., 57 LRRM 2599 (S.D.N.Y. 1964) 34

United States *v.* National Marine Engineers Ass'n., 294 F.2d 385 (2d Cir. 1961) 23

United States *v.* National Maritime Union, 196 F. Supp. 374 (S.D.N.Y. 1961) 34

United States *v.* United Steelworkers (American Locomotive Company), 202 F.2d 132 (2d Cir. 1953), cert. denied before judgment, 344 U. S. 915 (1953) 10, 17, 22

United Steelworkers *v.* United States (Steel Industry), 361 U. S. 39 (1959) 12, 13, 18, 20, 34

Youngstown Sheet & Tube Co. *v.* Sawyer, 343 U. S. 577 (1952) 18, 20, 22

Statutes

Page

Defense Production Act, 50 U.S.C. App. § 2071 20

Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 141 et. seq.

Section 13, 29 U.S.C. § 163 17

Sections 206-210, 29 U.S.C. §§ 176-180 2-36

Norris-LaGuardia Act, 29 U.S.C. § 101 et. seq., Sec. 4, 29 U.S.C. § 104 ..... 17, 20

Selective Service Act of 1948, 50 U.S.C. App. § 451 et. seq. 20

Legislative Materials

Hearings before the Subcommittee on Labor and Labor Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong., 1st Sess., on Wage Stabilization and Disputes Program 14-15, 29-30

Hearings before the Subcommittee on Labor and Labor Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong., 2d Sess., on National Emergency Labor Disputes Act 15-16

House Conference Report No. 510, 80th Cong., 1st Sess. .. 27, 35-36

H.R. 3020, 80th Cong., 1st Sess. 23

S.2999, 82d Cong., 2d Sess. 15

Senate Report No. 105, 80th Cong., 1st Sess. 24

Senate Report No. 1037, 82d Cong., 1st Sess. 13-14

Senate Report No. 2073, 82d Cong., 2d Sess. 16-30

93 Cong. Rec. 4262 (Remarks of Senator Taft) 24

93 Cong. Rec. 4281 (Remarks of Senator Smith) 25

93 Cong. Rec. 5012 (Remarks of Senator Ball) 26

93 Cong. Rec. 6383 (Remarks of Cong. Hartley) 27-28

93 Cong. Rec. 6445 (Remarks of Senator Taft) 27

93 Cong. Rec. 6520 (Remarks of Senator Pepper) 27

93 Cong. Rec. 7345 (Remarks of Cong. Lesinski) 28

93 Cong. Rec. A2252 (Remarks of Senator Ball) 25

93 Cong. Rec. A3043 (Remarks of Senator Taft) 28-29

Miscellaneous

Executive Order No. 11314 31

National Emergency Disputes under the Labor Management Relations (Taft-Hartley) Act 1947-1965 (U. S. Dept. of Labor, Bureau of Labor Statistics Bulletin No. 1482) 31

Press Release, Senator Paul Fannin, January 3, 1967 (quoted in BNA, Daily Labor Report, January 3, 1967, at pp. A7-A8) 16

Standard Industrial Classification Manual 32

IN THE

Supreme Court of the United States

October Term, 1966

No.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
AND ITS LOCAL UNION 2958,

Petitioners,

v.

UNITED STATES OF AMERICA
AND
UNION CARBIDE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 23, 1966.

Petitioners request that this petition be accorded expedited consideration, and that if certiorari is granted, review on the merits be accorded like expedition. To that end, we have structured this petition to serve as our brief on the merits as well, and waive the right to file a separate brief on the merits.

The petition seeks review of the issuance of a national emergency injunction, enjoining for 80 days the continuation of a strike at the Kokomo, Indiana plant of Union Car-

bide Corporation, and requiring the employees to return to work at the old terms and conditions of employment. Unless reversed by this Court, the injunction will remain in effect for 80 days, i.e. until March 13, 1967, and will then automatically expire. 29 U.S.C. § 180. Expedition is warranted for two reasons:

1. If we are correct that the injunction was improperly issued, it is inflicting a grievious injury upon the 2100 employees, who, after striking for 85 days for higher wages, have been required to return to work at the old wages without resolution of their dispute. Every day the injunction continues compounds that injury. If it is to be reversed, it is obviously essential that reversal come at the earliest possible time.

2. The automatic expiration of the injunction on March 13, 1967 would moot this case unless it is decided prior thereto. This Court, therefore, can never review any important legal questions regarding the national emergency provisions except upon an expedited schedule.

OPINIONS BELOW

The opinion of the district court, which is unreported, is reproduced in the Appendix to this petition. The opinion of the Court of Appeals, which is not yet reported, is reproduced in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1966, and is reproduced in the Appendix to this petition. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. § 1254(1) and 29 U.S.C. § 178(c).

QUESTIONS PRESENTED

1. Whether Sections 206-210 of the Labor Management Relations Act, 29 U.S.C. §§ 176-180, the "national emergency" provisions, are applicable to a strike at a single plant which is not a substantial part of an industry.

2. Whether, when the Government acknowledges that the struck plant does not constitute a substantial part of an industry, the requirement of Section 208(a)(i) that, to be enjoinable, the strike must be one which "affects an entire industry or a substantial part thereof" is met by a showing that a product of the struck plant is purchased by a substantial part of another industry.

3. Whether the "industry" to be affected must be a *bona fide* industry, as distinguished from a subgroup of, or product classification within, an industry. Specifically, whether, within the meaning of Section 208(a)(i), there is a "military aircraft engine industry", or whether the "industry" is aircraft engines and engine parts, including both military and civilian.

4. Whether "entire industry or a substantial part thereof" means a substantial proportion of an entire industry (as alleged by petitioners), or any production which, regardless how large or small a proportion of the entire industry, "rests upon a resource commitment of a very substantial nature indeed" (as held by the Court below).

5. Whether, when the Government elects to introduce no evidence to prove what part of the industry is affected, the Court may conclude, from its "common knowledge" of the magnitude of the war effort, that the strike affects a "substantial part" of an industry.

STATUTORY PROVISIONS INVOLVED

Sections 206-210 of the Labor-Management Relations Act of 1947 as amended, 29 U.S.C. §§ 176-180, 61 Stat. 155, provide in pertinent part as follows:

Sec. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out:

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code

and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in [28 U.S.C. § 1254].

Sec. 209 (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Sec. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever

happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

STATEMENT OF THE CASE

This action was brought by the United States pursuant to Sections 206-210 of the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 176-180, the so-called "national emergency" provisions. Those provisions authorize the enjoining of a strike which "affects an entire industry or a substantial part thereof" and "imperils the national health or safety" (Section 208(a) of the Act, 29 U.S.C. § 178(a)). The United States asserted that a strike by petitioners at the Kokomo, Indiana plant of Union Carbide Corporation (hereinafter the Company) was enjoinable under these provisions. The case presents important questions as to the meaning of Section 208(a)(i), which provides that a strike, to be enjoinable, must affect "an entire industry or a substantial part thereof."

Facts Preceding the Institution of Suit

On September 29, 1966, the 2100 employees of the Kokomo plant of Union Carbide Corporation struck for higher wages. There is no dispute that the strike was entirely lawful.

On December 19, 1966, after the strike had been in progress for 81 days, the President signed an Executive Order invoking the Taft-Hartley national emergency procedures, and appointing a Board of Inquiry to investigate the dispute.

The order stated the President's "opinion" that the strike at the Kokomo plant affected "a substantial part of the military aircraft engine industry," and that, if permitted to continue, it would "imperil the national safety." (R. 21-22)

The Board of Inquiry held hearings on December 20, 1966, and made its report to the President that evening. Pursuant to its limited statutory responsibilities (Section 206, 29 U.S.C. § 176), the Board reported only on the issues involved in the labor dispute. It did not take evidence, or report, on whether the strike affected an entire industry or a substantial part of an industry, nor on whether the strike imperiled the national health or safety. (R. 35-42)

Upon receipt of the Board's report, the President directed the Attorney General to institute this action for an injunction against the continuation of the strike at the Kokomo plant. (R. 14-15)

Proceedings in the District Court

The complaint alleged that the strike affected a "substantial part of the military aircraft engine industry," and that, if permitted to continue, it would imperil the national safety. The parties stipulated that the case would be tried on affidavits. (R. 5-6, 23)

On the issue of peril to the national safety, the Government submitted two affidavits, one by Deputy Secretary of Defense, Cyrus Vance, and the other by Air Force Major General Harry E. Goldsworthy. The Vance affidavit stated that the Kokomo plant produced a particular type of metal alloy, not elsewhere obtainable, which was sold to General Electric Company for use in the manufacture of aircraft engines for three denominated fighter planes—the F-4, RF-4 and F-104; and that, in addition, the Kokomo plant produced particular types of "blade castings," "blades" and "vanes," not elsewhere obtainable, which were sold to General Electric Company and Avco Corporation for use in the manufacture of engines for five denominated military heli-

copters, the CH-53, CH-46, SH3D, UH-1 and CH-47. Without these materials, the Vance and Goldsworthy affidavits asserted, the production of these particular engines would be delayed, to the detriment of the war effort and, consequently, the national safety. In reply, petitioners submitted the affidavit of Dr. Charles Mantell, a noted metallurgist, who stated that there were other alloys available, from other manufacturers, which could be used in certain of the denominated engines in place of the alloy manufactured in the Kokomo plant. (R. 16-19, 137-140, 131-133)

With respect to the other statutory prerequisite to injunction—that the strike "affects an entire industry or a substantial part thereof"—the Government's affidavits were virtually silent. The Vance affidavit merely reiterated the language of the statute:

> "8. The existing work stoppage at the Stellite Division of Union Carbide Corporation, Kokomo, Indiana, which has been in effect since September 30, 1966, affects a substantial part of the military aircraft engine industry of the United States, an industry which is engaged in trade, commerce, transportation, transmission and communication among the several states and with foreign nations and in the production of goods for commerce . . ." (R. 19)

A second affidavit, of Mr. Paul McGann, attached a table showing total industry shipments of "aircraft engines and parts," and subtotals of shipments to various categories of customers. (R. 134-136)

On the "industry" issue, petitioners submitted affidavits of Wise Stone, Associate Director of the Aerospace Division, United Automobile Workers, and Woodrow Ginsburg, Research Director of the Industrial Union Department, AFL-CIO. The Stone affidavit averred that there is no separate "military aircraft engine industry"; that the same basic engines are manufactured in both military and civilian versions; that military and civilian engines are manufactured

by the same companies, in the same plants, using the same employees; and that, indeed, the very engines affected by the Kokomo strike are made in both military and civilian versions. The Ginsburg affidavit stated that the Government's own industrial classification system identifies the industry as "aircraft engines and engine parts," including both military and civilian. The Stone affidavit concluded that, even if there *were* a "military aircraft engine industry," the engines affected by the strike constitute only "a small proportion of the total production of military aircraft engines." (R. 48-54, 84-89)

The District Court concluded that the Government was entitled to an injunction. The court had "no difficulty with the second question presented—that is affecting the safety of the country—in view of the evidence submitted." With respect to the first question—whether the strike affected "an entire industry or a substantial part thereof"—the court concluded that "the strike at the Kokomo plant does have *a substantial effect on* the industry of production of military aircraft engines and therefore is encompassed within the Act." (Emphasis supplied). (App. 37-38)

The injunction signed by the District Court on the evening of December 21, 1966 ordered the employees at the Kokomo plant to return to work under the terms and conditions which had been in effect prior to the strike. At petitioners' request, the District Court stayed its injunction until noon of the following day, to permit an appeal to the Court of Appeals. (R. 152-154, 155)

Proceedings in the Court of Appeals

On the morning of December 22, 1966, the parties appeared before a panel of the Court of Appeals. The court heard argument on the merits at that time, and entered an order further staying the injunction until 5 p.m. the following day, to permit it to decide the case on the merits. (R. 200)

On December 23, 1966, the Court of Appeals affirmed. Its opinion noted that petitioners were not challenging the finding as to the second prerequisite—peril to national safety—but only as to the first—whether the strike "affects an entire industry or a substantial part thereof." (App. 41-42)

Petitioners had advanced three contentions on this point. First, petitioners contended that Section 208(a)(i) requires that the strike affect the entire industry or a substantial part of the industry *in which the strike is occurring*—here the metal alloys industry—and that the statute is not met by showing that the strike indirectly affects another industry which purchases the struck product. The Court of Appeals rejected this contention, stating that "it is disposed of to our satisfaction by *United States* v. *United Steelworkers (American Locomotive Company)*, 202 F.2d 132 (2d Cir. 1953), *cert. denied before judgment*, 344 U. S. 915." (App. 42)

Second, petitioners contended that, even assuming effect on a customer industry can be considered, the only "industry" alleged by the Government to be affected—the "military aircraft engine industry"—is not an "industry," but only a subgroup of, or product classification within, the aircraft engine and engine parts industry. The court rejected this argument on the ground that the record evidence, "especially when read with the common sense which should inform the judicial process as any other," demonstrated that extensive resources are devoted "to the building of aircraft engines designed for use in military aircraft." The petitioners' statistics showing that military engines are a small portion of the entire aircraft engine and engine parts industry "impressed" the court "as supporting a discernible division between military and civilian production." (App. 42-43 and n. 1)

Finally, petitioners contended that even if there were a "military aircraft engine industry," the Government had introduced no evidence whatsoever to show that the strike

affected "a substantial part thereof." Petitioners pointed out that, while the Government identified certain engines which were affected by the strike, it introduced no evidence regarding the volume of production of those engines, nor of the dimensions of the entire "military aircraft engine industry" from which a court could determine whether the affected engines constituted a "substantial part" of the "industry." The court below acknowledged that "this record arguably does not admit of an identification in concrete terms of the total resources of this country employed in the manufacture of military aircraft engines." It concluded, however, from "common knowledge," that the production of the particular engines affected required "a resource commitment of a very substantial nature," and that the entire industry "is great, but it is not unlimited." These assumptions, unsupported by any factual data in the record, sufficed, it concluded, to satisfy the statutory requirement that the strike "affects an entire industry or a substantial part thereof." The court's full opinion on this point was as follows:

> "In respect of the second branch of the inquiry, the statute does not embody an all-or-nothing approach. The District Court did not have to find that the "entire" military aircraft engine industry was affected, but only that a significant segment of it was. This record arguably does not admit of an identification in concrete terms of the total resources of this country employed in the manufacture of military aircraft engines. But, in the light of what is common knowledge of the magnitude of the effort this nation is being called upon to make in Southeast Asia it is impossible to read what is in this record of the types and functions of the aircraft involved without concluding that their availability in adequate numbers to every branch of the armed services rests upon a resource commitment of a very substantial nature indeed. Our industrial might—in air-

craft engine manufacture as elsewhere—is great, but it is not unlimited. We would overestimate it sadly if we were to conclude, on this record, that an effort of very substantial proportions is not required of the military engine aircraft industry to keep these planes and helicopters moving steadily to the area of critical need." (App. 43-44)

The injunction went into effect at 5 p.m., December 23, 1966, and the employees at the Kokomo plant who have been recalled have returned to their jobs. Unless reversed by this Court, the injunction will continue in effect for 80 days, i.e., until March 13, 1967, at which time it will automatically expire. Section 210 of the Act, 29 U.S.C. § 180.

REASONS FOR GRANTING THE WRIT

This case presents important questions which have not been, but should be, decided by this Court.

1. This Court has dealt with the "national emergency" injunction provisions only once, in *United Steelworkers* v. *United States (Steel Industry)*, 361 U. S. 39 (1959). In that opinion, the Court recognized that there are two separate statutory prerequisites, each of which must be found by the court "upon the evidence adduced" before an injunction can be issued, 361 U. S. at 41. The courts must find first, that the strike affects an entire industry or substantial part thereof, and second, that it imperils the national health or safety.[1]

[1] The *per curiam* opinion of the Court states that "the statute imposes upon the courts the duty of finding whether a strike or lockout meets the statutory conditions of breadth of involvement *and* peril to the national health or safety." 361 U.S. at 41 (emphasis added). In their concurring opinion, Justices Frankfurter and Harlan emphasized that "§208 states two separate criteria, both of which must be satisfied before an injunction may issue against a strike, and it states no other relationship between them than that both must proceed from 'such strike'." 361 U.S. at 51.

Justice Douglas, in his dissenting opinion, also recognized the separateness of the two requirements. He stated that the "first requirement of the Act" that the strike affects a substantial portion of an industry

In *Steel Industry,* the Court discussed at length the second of these requirements—peril to the national health or safety. It did not, however, deal with the first—when a strike "affects an entire industry or substantial part thereof"—because the existence of that factor was not in dispute. The strike involved 500,000 employees and had closed 85% of the nation's steel mills. 361 U. S. at 63.

The instant case presents important questions of statutory construction relating to the first prerequisite—the "industry" standard. As we will show, Congress intended the "national emergency" provisions to be applicable only to industry-wide strikes, which shut down all or a substantial part of the struck industry. It was for this reason that the "industry" standard was inserted in the statute, as a requirement which must be satisfied in addition to the "national health or safety" requirement.

Congress did *not* intend that these provisions apply to a single-plant strike which cuts off a particular product needed by the defense establishment. Indeed, during the Korean War, when problems of this sort began to occur, the Senate Committee on Labor and Public Welfare considered whether the national emergency provisions were available to meet this situation. It concluded that they were not:

> "It is well to note that the scope of the emergency strike must affect 'an entire industry or a substantial part thereof', in order to qualify for the series of procedures set forth in this section of the Taft-Hartley law.
>
> "The emergency disputes provisions of the Taft-Hartley law were not designed to meet problems of the sort developing in a defense economy. Specifically, this means that it is entirely possible that a small-parts

---

"is satisfied," but then concluded that on the record the second requirement—peril to the national health or safety—had not been adequately established. 361 U.S. at 69-70.

manufacturer making a part important to the defense effort can be involved in a dispute and not qualify under the Taft-Hartley law as a dispute affecting 'an entire industry or a substantial part thereof'."[2]

In the hearings leading to this report, Senator Taft made the same point with reference to a hypothetical situation almost prophetically similar to the present case:

"DR. LEISERSON. Now, as I was saying about the dispute matter, . . . a lot of the disputes that the President might have to refer to this Wage Stabilization Board under the present regulations might really be a little bit of a dispute. I remember in the last war there was a dispute in one comparatively small company in Michigan. But they made a part that went into every airplane. Well, it was very vital.

"SENATOR HUMPHREY. Now, in the instance of, let us say, the small company that you mentioned a moment ago, do you visualize that the emergency provisions of the Taft-Hartley Act would apply to such a small company?

"DR. LEISERSON. I don't know . . . .

"SENATOR TAFT. Of course, it never was intended to deal with this kind of a situation. It was intended to deal with a nation-wide strike in normal peacetimes, and only national strikes substantially. So I think it must be admitted that it is not suited or is not intended to apply to this kind of a situation.

"SENATOR HUMPHREY. It was for a different kind of economic picture than we have, and it was not intended for a mobilization situation as such. . . .

"SENATOR TAFT. Well, the Taft-Hartley provisions as they apply to a wartime emergency situation

---

[2] Senate Report No. 1037, 82nd Cong. 1st Sess., pp. 3-4

> are not satisfactory, certainly not to me, and nobody seems to know what is the best method of handling these emergency situations. But here you have a question which may extend to very small plants that have a direct effect on the mobilization of industry, that were never intended to be covered by the Taft-Hartley Act."[3]

Shortly thereafter, legislation was introduced to make the national emergency provisions of Taft-Hartley applicable to strikes in a "vital industry or plant" which endanger the national security. S.2999, 82nd Cong., 2d Sess., 1952. At the hearing on this bill, Professor Nathan Feinsinger, then Chairman of the Wage Stabilization Board, discussed the inadequacy of the existing law, using as his specific example a strike at a *single plant manufacturing jet engines*:

> "When collective bargaining, mediation and conciliation have failed, there is, generally speaking, no further means of preventing a strike or other interruption of production except through the process of a national emergency injunction obtained pursuant to Title II of the Taft-Hartley Act. Such injunctions, however, are available only when the dispute or strike would 'imperil the national health or safety' and involves 'an entire industry or substantial part thereof'.
>
> As Senator Taft himself has pointed out, the injunction is reserved for national strikes. It would not be available in most of the disputes with which the [Wage Stabilization] Board is dealing. *Such disputes, for example, may include a single jet engine plant, which, while vital in terms of defense effort, may be only a*

[3] Hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82nd Cong., 1st Sess., on Wage Stabilization and Disputes Program (1951), p. 19.

small segment of the industry. Therefore, the injunction provisions of the Taft-Hartley Act could not be invoked."[4]

The Senate Committee on Labor and Public Welfare, in its report recommending the bill, stated:

> "Section 206 of the present Taft-Hartley Act applies to strikes and lock-outs 'affecting an entire industry or a substantial part thereof' so as to 'imperil the national health and safety'. This new section would permit application of the new procedures *to a unit smaller than a 'substantial part' of an industry.* This would meet the potential need of insuring production in *one or a few plants producing critical items.*" (Emphasis added.) S. Rep. No. 2073, 82nd Cong., 2d Sess., 1952.

This bill failed to pass.[5] Yet in subsequent years, the Government, with the acquiescence of the lower courts, has mis-

---

[4] Hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong. 2d Sess. on the National Emergency Labor Disputes Act (S. Bill No. 2999) (1952), at p. 33; emphasis added.

[5] Coincidentally, eleven days after the decision below, Senator Fannin reiterated the Congressional view that the statute is not applicable to single plant strikes. See Press Release, Senator Paul Fannin, January 3, 1967 (quoted in BNA, Daily Labor Report, January 3, 1967, at pp. A7-A8). The release describes a speech delivered by Senator Fannin urging that the national emergency provisions be amended to make injunctions permanent, rather than of only 80 days duration. It continues:

> "To counteract expected charges that his proposal would harm unions, Fannin said that *unions would retain the right to strike a particular plant or even a segment of an industry.* 'The open-end injunction would be enforced only if the strike were industry-wide, and then only if it jeopardized national health and welfare', he said." (Emphasis added).

used the statute to reach these very situations.[6] The lower courts' acquiescence is not entirely surprising. Most of the national emergency injunction actions have been uncontested. The Government, based on its allegation of peril to the national safety, has secured temporary restraining orders breaking the strikes, and there were no subsequent hearings. The only two cases in which the "industry" issue has been actually litigated are *American Locomotive, supra,* and the instant case.

These cases contradict the express intent of Congress. But, more, they have effectively written the "industry" requirement out of the statute, and they have trespassed on the right to strike—a right which Congress has been most solicitous to protect[7]—in areas where Congress has expressly determined the right should not be abridged.

2. The harm inflicted by these erroneous decisions is compounded, because the time limitations built into the statute —particularly the automatic expiration of the injunction after 80 days (§ 210, 29 U.S.C. § 180)—have conspired to make review by this Court almost impossible. In the usual course, review through the Court of Appeals and this Court could not be obtained within 80 days and the case is mooted by the expiration of the injunction.[8]

---

[6] In addition to the instant case, see, e.g., *United Steelworkers v. United States (American Locomotive Co.)* 202 F.2d 132 (2d. Cir. 1953); *United States v. International Association of Machinists (Republic Aviation Co.)* (E.D.N.Y. Civil No. 62-C-662, unreported, 1962); *United States v. General Electric Co.*: (S.D. Ohio, Civil No. 3350, 1966, unreported).

[7] See e.g., Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104, and Section 13 of the National Labor Relations Act, 29 U.S.C. §163.

[8] In the one prior case in which a union sought to challenge abuse of the "industry" standard, *United Steelworkers v. United States (American Locomotive),* 202 F.2d 132 (2d Cir. 1953), the Court of Appeals' decision did not issue until the 77th day in the life of the injunction. In desperation, the union had petitioned for certiorari prior to the Court of Appeals' judgment, but certiorari was denied, 344 U.S. 915 (1953).

The present case, like *Steel Industry,* has arrived here in time only because the injunction was stayed, and the 80 days did not begin to run until *after* the Court of Appeals' decision was rendered. This case thus presents a unique opportunity for review of the emasculation of the "industry" requirement. If review is not granted now, this Court may never get another chance to review the developing body of decisional law in the lower courts supporting the application of the Act to single-plant strikes.

3. The emasculation of the "industry" standard has resulted from three dubious interpretative devices, all of which were employed by the Government in this case. Because this petition will also serve as our brief on the merits, should certiorari be granted, we discuss these issues of interpretation at somewhat greater length than normally we would in a petition for certiorari, at pp. 21-36 herein.

In a broader sense, however, the importance of this case transcends the need to correct the particular erroneous interpretations advanced by the Government and adopted by the Court below. The fundamental concern here, as in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 577 (1952), is whether a threat to the national safety or health entitles the executive branch to proceed without authority from, or contrary to limitations imposed by, the legislative branch. In *Youngstown,* despite evidence that a steel strike would cripple the Nation's conduct of the Korean War effort, this Court held that the President could not exceed the powers conferred upon him by Congress in securing continued defense production.

Here, the Government has not seriously attempted to prove compliance with the "industry" limitation. Indeed, it introduced virtually no evidence to support a judicial finding that the strike at the Kokomo plant "affects an entire industry or a substantial part thereof." Instead, it has sought, by invocation of the spectre of peril to the national

safety, to panic the lower courts into ignoring the "industry" requirement.

The Government's effort to persuade the courts below to ignore the "industry" requirement is apparent from the brief it submitted to them.[9] The argument portion of the Government's brief began as follows:

> "In the long period of post-war international tension, it is not surprising that the President, in his concern for the Nation's well-being, should invoke the provisions of the Act when a work stoppage occurs, or is threatened, which, in his judgment, imperils the safety or health of the Nation. Nor is it surprising that the courts, equally impressed with the need to guard our health and safety, should grant the injunctions requested. Thus, since the enactment of the Act in 1947, the Government has on many occasions asked for and received the aid of the courts in these circumstances." (R. 28)

The conclusion of the Government's brief likewise invited the courts below to ignore the "industry" question:

> "When, as in this case, the evidence presented to the Court so clearly establishes that the Nation's safety is threatened and that there are threats of irreparable injury to the Nation for which legal remedies would be inadequate, a preliminary injunction, as prescribed by Rule 65 of the Federal Rules of Civil Procedure, should issue to enjoin the strike." (R. 33)

Nor was enlightenment shed in the body of the brief. The only legal discussion[10] of the "industry" requirement suggested that it should be ignored:

---

[9] Memorandum of Points and Authorities in support of Plaintiff's Motion for Preliminary Injunction. The parties rested in the Court of Appeals on the briefs they had filed in the District Court.

[10] There were two other references to the "industry" requirement in the brief. One was the statement that "The President by Executive Order *found* that this threatened strike affects a substantial part of industries engaged in trade or commerce among the several states and

"3. The strike to be enjoined need not be industry-wide if, in fact, it imperils the national health or safety." (R. 29)

Contrary to the Government's efforts, however, the "industry" requirement *does* exist in the statute as a specific limitation on the power to enjoin strikes, and Congress, though it considered broadening the statute to include single-plant strikes, did not do so.

There are, of course, other statutory powers available to the President to secure the material manufactured at the Kokomo plant. Section 18 of the Selective Service Act of 1948, 50 U.S.C. App. § 468[11]; Defense Production Act, 50 U.S.C., App. § 2071. The issue in this case is whether the President may, even though he possesses such powers, assert instead a power which Congress has not authorized. We submit that he may not.

4. The decision below constitutes a threat to the Congressionally protected right to strike. In adopting the national emergency provisions, Congress carved out a carefully limited exception to Norris-LaGuardia's prohibition against federal court injunctions of strikes. Cf. Section 208(b) of the Act, 29 U.S.C. § 178(b) with Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104. If we are correct that the injunction in this case transgressed the Congressional limita-

---

that it will imperil the national safety." (R. 33) (Emphasis supplied.) The President did *not* so find, however. He merely stated his "opinion" in the Executive Order. As this Court made clear in *Steel Industry*, the finding must be made by the Court "upon the evidence adduced." 361 U. S. at 41. At one other point, the brief recites the statutory language with the general statement that, once it is met, "The Court is required to issue the injunction." (R. 30)

[11] Under the Selective Service Act, the Government has the right to take possession of a plant to secure a needed defense product, where the Company fails to deliver the product. This power has been frequently used. See Appendix II to Mr. Justice Frankfurter's concurring opinion in *Youngstown, supra* 343 U. S. at 620-628.

tion, the injury to the employees in the Kokomo plant is apparent.

These employees ceased work, and sacrificed their wages, for a period of 85 days, in an effort to require the Company to pay them higher wages. In so doing, they were exercising, at great personal cost and hardship, the only economic weapon they possess to secure their desired terms and conditions of employment. The issuance of the injunction below deprives them of that weapon; but more, it has rendered the 85 days of lost wages—which had not yet culminated in a resolution of the wage dispute—totally wasted. The Company is now in the enviable position of having the strike broken, and of securing 80 days of employment from its employees at the *old* wages—wages at which the employees, by their strike, had demonstrated they were unwilling to work. While this is, of course, the consequence of every Taft-Hartley injunction, the injury is particularly grievous if, as we have contended, the injunction was erroneously issued. That injury would, to some extent, at least, be lessened if this Court granted review, and terminated the injunction short of the full 80-day period.

5. As we have earlier indicated, the emasculation of the "industry" requirement has resulted from a series of dubious interpretations of Section 208(a)(i), all of which were advanced by the Government in this case and adopted by the courts below. We now discuss these in greater detail.

First, the Government has contended in several cases that the "industry" affected need not be the struck industry. In this case, for example, the struck plant manufactured metal alloys. However, as the court below recognized, the Government does not contend that the strike at the Kokomo plant affects the "entire metal alloy industry" or a "substantial part" thereof. (App. 42) Indeed, this Company alone has a great many metal alloy plants, so that it is unlikely that the strike in Kokomo affects a substantial part of even this one Company's metal alloy production, let alone of the

entire metal alloys industry. Instead, the Government contends that the strike affects a substantial part of *another* industry—the military aircraft engine industry—which purchases a particular alloy manufactured in the Kokomo plant. This interpretation of the statute, looking to the "customer" industry rather than the "struck" industry, has also been adopted by the Second Circuit. *American Locomotive, supra, n. 6.*

The legislative history makes clear, however, that the Congress which enacted this statute was not seeking to enjoin strikes which indirectly affect customer industries. Rather, it was concerned solely with problems caused by industry-wide strikes, i.e. strikes which shut down the "entire", or a "substantial part" of, the struck industry. Extending the federal labor legislation, by interpretation, to abridge the traditional rights of employees in areas outside the Congressional concern is a practice which this Court has repeatedly condemned. *NLRB* v. *Fruit & Vegetable Packers,* 377 U. S. 58, 62-63 (1964); *NLRB* v. *Drivers Local Union,* 362 U. S. 274, 284 (1960). Accordingly, the issuance of injunctions against strikes which do not affect a substantial part of the struck industry is a development which should be reviewed by this Court.

That the Congressional concern was indeed limited to strikes affecting a substantial part of the *struck* industry is manifest from the legislative history. At the time that Taft-Hartley Act was adopted, the nation had just experienced a national coal strike and a national telephone strike. It was this experience which prompted Congress to adopt the national emergency provisions.

> "Under the urgency of telephone and coal strikes in the winter of 1946, Congress addressed itself to the problems raised by 'national emergency' strikes and lockouts." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 598-99 (1952) (concurring opinion of Justice Frankfurter).

President Truman, in his 1947 State of the Union Message,

> "called to the attention of Congress the pressing need to create 'an adequate system of effective machinery' to replace what had been done 'by the use of extraordinary war powers' to deal with '*the special and unique problem of Nation-wide strikes* in vital industries affecting the public interest' ". *United States* v. *National Marine Engineers Ass'n.*, 294 F.2d 385 (2d Cir. 1961) (emphasis added).

The Hartley Bill, which was passed by the House, dealt with the problem of industry-wide strikes by effectively outlawing industry-wide bargaining. H.R. 3020, 80th Cong., 1st Sess., Sections 9(f)(1), 12(3)(A) and 2(16).[12] That these provisions were indeed directed solely at the "evil" of industry-wide strikes was made clear by the report of the House Committee:

> "Probably the most important clause of section 9(f) is that which limits industry-wide bargaining and which, with sections 2(16) and 12(3)(A), dealing with monopolistic strikes, is designed to put an end to strikes, such as we have experienced particularly in the coal and steel industries, in which powerful and nation-wide unions have brought the compelling pressure of strikes to bear more upon the Government and the public than upon the employers involved." (1 Leg, Hist. 326).

After the Hartley Bill, H.R. 3020, passed the House, on April 17, 1947, the Senate took up consideration of the Taft Bill, S. 1126. The emergency provisions of that bill, both as

---

[12] Reprinted in 1 Leg. Hist. 187. The citation "Leg. Hist." refers to the compilation entitled *Legislative History of the Labor Management and Relations Act, 1947*, published in 1948 by the National Labor Relations Board.

reported out by the Senate Committee and as it passed the Senate, were much the same as those in the final Act, except as hereafter noted.

The entire history of this provision in the Senate makes it clear that Congress intended to cover, in Sections 206-210, precisely the same problem as was covered by the House in its prohibition against industry-wide bargaining, i.e., the industry-wide strike.

Thus the Majority Report of the Senate Committee declared:

> "Section 206 authorizes the Attorney General whenever he deems a threatened or actual strike or lock-out of such magnitude that the national health or safety is imperiled, to appoint a Special Board of Inquiry to make a public report to him."[13]

The debates on the floor of the Senate likewise make clear the Congressional intention that the national emergency provisions have application only to large scale strikes. Senator Taft, the author of these provisions, told the Senate that they provided "that if mediation is not successful and a strike occurs in a nation-wide industry, an injunction may be obtained. . . ."[14] He went on to say:

> "We could have handled the question of nation-wide bargaining as the House handled it, as an entirely separate matter, making it a conspiracy under the Sherman Act to enter into nation-wide bargaining. . . . Insofar as we propose to deal with it in title II, it is proposed to put it in the Wagner Act provision."

Senator Smith, likewise a member of the Labor Committee, described the national emergency provisions to the Senate as follows:

---

[13] Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess., p. 29; 1 Leg. Hist. 435.

[14] 93 Cong. Rec. 4262; 2 Leg. Hist. 1133.

> "Furthermore in title II of the bill we provide for the extreme cases which threaten national paralysis. *To meet an industry-wide stoppage* of some kind which may cause injury to the health or safety of 140,000,000 people, such as a transportation strike, or a coal strike, we have set up special machinery which will enable the Attorney General, on his own initiative, to petition the courts to prevent either a shut-down or a walk-out, until the mediation processes have had time to function."[15]

In a speech which he had printed in the Record, Senator Ball, also a member of the Labor Committee, gave the following description of the scope of the national emergency provisions sections of the Act:

> "This is the only provision in the Senate bill dealing with industry-wide bargaining and strikes, which all agree is one of our major problems. The Senate rejected an amendment to give local unions autonomy and stop internationals from dictating the terms of collective bargaining agreements on the grounds further study was needed. *As it is, the 80-day mediation period applies only to industry-wide strikes and unions can avoid its application completely by bargaining on a local or community basis.*"[16]

"Bargaining on a local or community basis" is exactly what the union has done here.

During the Senate debate, Senator Ball expressed his continued preference for the House method of seeking to prevent industry-wide strikes by restricting industry-wide bargaining, over the Senate method of dealing with the subject directly. Thus he declared:

> "The Senator from New Mexico [Mr. Hatch] said that he did not think this bill contained any provision

---

[15] 93 Cong. Rec., 4281; 2 Leg. Hist. 1145. Emphasis added.

[16] 93 Cong. Rec. A2252; 2 Leg. Hist. 1523. Emphasis added.

for dealing effectively with industry-wide strikes. True, it does not go to the cause of such strikes . . . it deals with the effect—the industry-wide strike—and not with the cause, which is the concentration in labor unions of control over employees in great industries and in their associations with employers. The proper solution would be to place those relationships back on a realistic basis, in which the employees would really have a voice in determining the conditions under which they would work.

However, I think the bill will be an effective deterrent to industry-wide strikes . . ."[17]

The Senate ultimately passed S. 1126 as an amendment to H.R. 3020 which had been passed previously by the House.[18] The two versions of H.R. 3020 then went to conference. In conference, the House bill's ban on industry-wide bargaining was abandoned. The conference adopted substantially the Senate provisions, changing only the requirement that the strike be one that "affects substantially an entire industry" to the requirement that it be one that "affects an entire industry or a substantial part thereof".

It was recognized both in the House and the Senate that the conference bill dealt only with industry-wide strikes, and that the effect referred to in the "industry" provision was an effect upon the struck industry, not some other industry. In describing the changes made by the conference, the report of the House conferees, which was submitted to both the House and the Senate,[19] stated:

"Furthermore, under the conference agreement the authority of this section may be invoked not alone when

---

[17] 93 Cong. Rec. 5012; 2 Leg. Hist. 1493.
[18] 93 Cong. Rec. 5117; 2 Leg. Hist. 1522.
[19] 92 Cong. Rec. 6436; 2 Leg. Hist. 1526

an entire industry is *involved* but where a substantial part of an entire industry is *involved.*"[20]

Comments from the floor, in both houses, confirm this statement that the conference bill was intended to be invoked only when an entire industry, or a substantial part of an entire industry, "is involved". Thus, Senator Taft in reporting to the Senate on the action of the conferees, declared that the provisions of the Senate bill dealing with national emergency strikes "have not been substantially changed."[21] Senator Pepper, on the other hand, in discussing the conference changes, declared that a considerable change had been made in these provisions. He said:

> "As I have just said, the Senate bill did not contain the words 'or a substantial part thereof', as applied to that provision. The Senate bill provided that *whenever an entire industry is threatened with a strike* or lockout, the President may appoint a board, which may lead to an application to the Attorney-General for an injunction, and to the impairment of the Norris-La-Guardia Act's provisions protecting the workers against government by injunction. But here, again, *the conference report is not satisfied with protecting against a strike in a case where an entire industry is affected,* but the conference report contains the words 'or a substantial part thereof.' "[22]

In the House, Congressman Hartley stated that the ban on industry-wide bargaining had been deleted. But, he stated, Section 206 contained provisions dealing with industry-wide strikes:

> "This section provides: That the President shall

---

[20] House Conference Report No. 510, on H.R. 3020, 80th Cong., 1st Sess., p. 64; 1 Leg. Hist. 568. Emphasis added.

[21] 93 Cong. Rec. 6445; 2 Leg. Hist. 1543.

[22] 93 Cong. Rec. 6520; 2 Leg. Hist. 1598. Emphasis added.

whenever he considers that the national health and safety is imperiled by a strike *in* a nation-wide industry or substantial part thereof first appoint a board of inquiry which shall obtain the facts and shall report to him within a reasonable time as specified by the President."[23]

The senior Democratic member of the House Labor Committee, Congressman Lesinski, likewise recognized that the Senate national emergency strike provisions were a substitute for the House effort to prevent industry-wide strikes by restricting industry-wide bargaining. He declared:

"When it comes to industry-wide bargaining, however, the conference report is anything but frank. It states that provisions of the House bill, restricting industry-wide bargaining, were omitted from the conference bill. Nonetheless, there is embodied in the conference bill a provision stating that in any strike imperiling the national health or safety *in* all or a substantial part of an industry, where an injunction has been issued, there must be a company vote of the employees on the final settlement offer of each employer before the injunction is discharged."[24]

The conference bill was accepted by both Houses. It was vetoed by President Truman and ultimately passed over the veto. Immediately after the veto, and before the vote, Senator Taft made a speech on the veto message, which Senator Ball had printed in the Congressional Record. In the course of this speech, Senator Taft declared:

"Perhaps the most extraordinary provision of the message is the President's attack on the section permitting *an injunction against a nation-wide strike* affecting the national health and safety. It was through

[23] 93 Cong. Rec. 6383; 1 Leg. Hist. 882. Emphasis added.
[24] 93 Cong. Rec. 7345; 1 Leg. Hist. 910. Emphasis added.

such a procedure that he secured an injunction against John L. Lewis last fall. Last year when faced by a *nation-wide strike,* it was the President himself who recommended Government seizure and the drafting of all strikers into the United States Army. *Because Congress now gives him a carefully drafted authority to delay such a strike,* to attempt mediation and finally to conduct a strike vote when other remedies have been exhausted, he says the procedure will do more harm than good. He prefers to let the Smith-Connally Act expire on June 30 without any protection whatever for the people against *nation-wide* strikes."[25]

The course of the legislative history thus outlined makes clear that Congress was concerned only with strikes *in* an entire industry or substantial part thereof. This is not a matter of the casual use of language in impromptu speeches in the House and Senate. The conclusion that the bill was intended to cover only industry-wide strikes, or those substantially industry-wide, rests on carefully drawn committee reports in both houses, prepared speeches by the authors of both the Senate and the House bills, and the comments of every member of either the Senate or House who commented upon the scope of these provisions.

This limited scope of the national emergency provisions was confirmed when, in 1952, Congress faced the problem of single-plant strikes which interfered with the Korean war effort. In the legislative history which we have already described (*supra,* pp. 13-16), Congress made clear its understanding that the provisions do not reach the immobilization of a customer industry by a single-plant strike which involves less than a substantial part of the struck industry.[26] New

---

[25] 93 Cong. Rec. A3043; 2 Leg. Hist. 1626 (Emphasis added).

[26] Senator Taft's analysis of the hypothetical case presented in the hearings (supra, pp. 14-15), is particularly revealing. The strike there was at a plant making a part "that went into every airplane." It is thus clear that the *entire* customer industry—the aircraft industry—

legislation to extend the emergency provisions to strikes in a "vital plant" was introduced, reported out of committee, but not enacted.

In the face of this clear Congressional intent to limit the national emergency provisions to strikes affecting all or a substantial part of the *struck* industry, coupled with Congress' general concern for preservation of the right to strike,[27] the extension permitted by the court below is a clear departure from the principles enunciated in *NLRB* v. *Fruit & Vegetable Packers, supra,* and *NLRB* v. *Drivers Local Union, supra,* and warrants review by this Court.

Second, even assuming that the effect of a strike may be measured in a customer industry, as the court below held, does not suffice to establish the Government's case. For it still remains for the Government to prove that there is an "industry," a substantial part of which is affected by the strike, and here is where the Government has employed the second interpretative device designed to emasculate the industry requirement. It has invented artificial "industries," where none existed before, within which to measure the effect of a strike. Born in the President's Executive Orders, these industries flourish in the Government's affidavits and pleadings during the lawsuit, only to vanish from existence once the injunction is granted. When Congress used the term "industry" in Section 208(a)(i), it had in mind broad, nationwide industries in the usual sense of that term —coal, steel, telephone, longshore, shipping, etc. (See the

---

was affected. Nevertheless, Senator Taft explained that the national emergency provisions did not reach the situation, because they applied only to "national strikes." Likewise, the Committee Report recommending extension of the Act to strikes in a "vital plant" (supra, p. 16) recognized that the "industry" requirement related only to the struck industry. The proposed change, the Committee reported, "would permit application of the new procedures *to a unit smaller* than a 'substantial part' of an industry." (Emphasis added)

[27] See n. 7, *supra*

legislative history detailed *supra).* And, indeed, in all but three cases in which the emergency provisions have been invoked, a recognizable "industry" was alleged to be affected.[28] In three recent cases, however, the Government has begun a practice of alleging effects on exotic "industries", which change their shape to fit the lawsuit.

No clearer demonstration of this phenomenon can be found than by comparing these three recent invocations of the statute. In *United States v. International Assn. of Machinists (Republic Aviation)* (E.D.N.Y. Civil No. 62C662, unreported, 1962), the Government sued to enjoin a strike at a single plant manufacturing a particular tactical fighter plane. The "industry" alleged and found to be affected was the "tactical fighter production industry." In *United States v. General Electric Co.,* (S.D. Ohio, 1966, Civil No. 3350, unreported), the Government sued to enjoin a strike at the Evendale, Ohio plant of General Electric Company. That plant produces, *inter alia,* engines for the F-4, RF-4 and F-104 fighter planes. The "industry" alleged, and found, to be affected by the strike was the "military *jet* engine industry."[29] In the present case, the strike at Ko-

[28] Since 1947, the national emergency provisions have been invoked 26 times. The first 24 instances are described in National Emergency Disputes under the Labor Management Relations (Taft-Hartley) Act 1947-65 (U.S. Dept. of Labor, Bureau of Labor Statistics Bulletin No. 1482). The two most recent instances are *United States v. General Electric Co.* (S.D. Ohio, 1966, Civil No. 3350, unreported) and the instant case. 23 of the first 24 cases involved "industries" in the normal sense of that term. Six of these instances involved the longshore industry, five, the atomic energy industry, three, the coal industry, three, the maritime industry, two, the aircraft industry, and one each the steel, telephone, meatpacking, and copper industries. One of these earlier cases, as well as the two most recent, have involved product groupings which clearly are part of a broader "industry". They are discussed in the text.

[29] The Executive Order, but not the complaint, also alleged an effect upon a number of other unlikely "industries", including the "military electronics industry". Executive Order No. 11314.

komo was alleged to be cutting off materials needed by this same plant—the Evendale plant of General Electric—as well as two other plants at which helicopter engines are made. In order to squeeze the helicopter engines into the same "industry" with the jet engines, the Government, with the acquiescence of the courts below, simply redefined the industry as the "military *aircraft* engine industry." With similar facility, the Government can create in each case a new "industry" tailored to fit its litigation needs. If defined with sufficient imaginativeness, of course, there can always be an "industry" affected by any strike.

The Government's creation for this case—the "military aircraft engine industry"—was shown by petitioners' undisputed affidavits not to exist. It is merely a part of the "aircraft engine and engine parts" industry. (R. 48, 54, 86-87)

The same basic engines are adapted for use in both military and civilian aircraft. (R. 50-51) Engines for both military and civilian aircraft are manufactured in the same plants, by the same companies, and by the same employees. (R. 48-49). Indeed, the very engines made at the plants affected by the Kokomo strike have both military and civilian versions. (R. 50-51) Those who are in the aircraft field consider that there is one industry—the aircraft engine industry. (R. 48) And the Government's own *Standard Industrial Classification Manual* identifies the industry as "aircraft engines and engine parts", including engines and parts for both military and civilian aircraft. (R. 84-87) The Government introduced no countervailing evidence supporting its claim that there is a separate "military aircraft engine industry".

The reasons advanced by the court below for accepting the Government's creation are untenable. The court found, "from this record, especially when read with the common sense which should inform the judicial process as any other" that a great deal of capital, technological skill, and manpower go into the "building of aircraft engines designed for

use in military aircraft." (App. 43) This may well be so, but it does not prove that there is a separate *military* aircraft industry, when the very same engines are designed for use in *civilian* aircraft. In addition, the court below stated that petitioners' statistics showing that military engines constitute less than one-quarter of all engines produced "impress us as supporting a discernible division between military and civilian production." (App. 42-43, n. 1) We do not understand why. We doubt that figures showing that butter sold to the military constitutes less than one-quarter of all butter produced would "impress" a court "as supporting a discernible division" between military and civilian butter, such as to warrant recognition of a "military butter industry."

If "industry", as used in Section 208(a)(i), is to be interpreted as the Government here has done, and for the reasons assigned by the court below, the "industry" requirement will simply cease to have meaning, and the line which Congress intended to draw will vanish. This should not be permitted to occur without review by this Court.

Third, even permitting the Government to construct an artificial customer industry affected by the Kokomo strike was not sufficient to warrant issuance of the injunction. It remained for the Government to establish that the strike affected a "substantial part" of that "industry". On this point, there was a total failure of proof, as the court below virtually acknowledged. (App. 43). The court bridged this gap by two steps. First, it invoked "common knowledge" of "the magnitude of the effort this nation is being called upon to make in Southeast Asia", and drew therefrom the tenuous conclusion that the production of the particular engines affected by the strike "rests upon a resource commitment of a very substantial nature indeed." (App. 43). Second, it held that such a substantial commitment satisfies the statutory "industry" requirement, regardless of how large or small a part of the industry it con-

stitutes. (App. 43-44). Both steps in its reasoning process warrant review by this Court.

(a) The lower court's drawing of extra-record assumptions about the magnitude of the resource commitment involved in building the particular engines affected by this strike is directly contrary to this Court's holding in *Steel Industry*. This Court there held the Act constitutional, in the face of a claim that the courts are merely rubber stamps of the executive, precisely because the duty of fact-finding "upon the evidence adduced" rests with the courts:

> "The statute imposes upon the courts the duty of finding, *upon the evidence adduced*, whether a strike or lockout mets the *statutory conditions of breadth of involvement* and peril to the national health or safety . . .
>
> ". . . the availability of relief, in the common judicial form of an injunction, *depends on findings of fact, to be judicially made*." 361 U. S. at 41, 43. (Emphasis added).

When, as here, the Government elects to introduce no evidence whatsoever as to the magnitude of the resource commitment required to produce these engines, or as to the scope of the industry, it becomes a mockery of judicial fact-finding for the courts to indulge in guesswork of the type found in the opinion below. It may well be that the engines affected do *not* constitute a substantial resource commitment, let alone a substantial part of the industry. The Government has not said that they do, and we assume it would have said so if it were the fact. When the facts support its contention of substantiality in these cases, the Government has been quick to introduce voluminous evidence to that effect. See, e.g. *Steel Industry, supra; United States* v. *National Maritime Union*, 196 F. Supp. 374 (S.D.N.Y. 1961); *United States* v. *International Longshoremen's Assn*, 57 LRRM 2599 (S.D.N.Y. 1964).

(b) But even if the court's guesswork were proper, the result achieved is not. For the issue under Section 208(a)(i) is *not* whether the engines affected involved a substantial commitment of resources, but whether they constituted a substantial part of an entire industry. On this point, the court below did not even venture a guess. Nor did the district court, which also side-stepped the issue by finding that the strike had "a *substantial effect on* the industry of production of military aircraft engines." (App. 38)

As we have shown, the emergency provisions were passed in response to fears regarding industry-wide strikes, two of which had just been experienced in the coal and telephone industries. The House's proposed solution was to abolish industry-wide bargaining. In the Senate, this was regarded as too bold a measure to deal with a more easily remediable problem. Since the problem with industry-wide strikes was their potential effect on the national health and safety, Senator Taft proposed that they be enjoinable when they imperil the national health and safety. Accordingly, the Senate bill made enjoinable strikes affecting "an entire industry" which imperil the national health and safety. In Conference, the House conferees acquiesced in the Senate's approach to dealing with industry-wide strikes. The only change was to add the words "or a substantial part thereof." While there is no express explanation of the intended meaning of this addition, it is clear from the context that it was a safeguard to prevent nonapplicability where—as in the 1959 steel strike—only 85% of the industry, less than "the entire industry," was affected. That Congress intended the "substantial part" to be a proportion of the "entire industry," and not, as found by the court below, any substantial volume of expenditures regardless how large or small the proportion of the industry, is clear from the Conference Report which explained:

> "[U]nder the conference agreement the authority of this section may be invoked not alone when an entire

industry is involved but where a *substantial part of an entire industry* is involved." House Conference Report No. 510, 80th Cong., 1st Sess., p. 64.

The "guess" of the court below—that there are substantial expenditures on the particular military aircraft engines affected—does not, we believe, meet the Congressional requirement of a finding that the strike affected "a substantial part of an entire industry."

At the very least, if such a reading is henceforth to be applied to this provision, thus interpreting it out of existence, that result should come only after review and decision by this Court.

CONCLUSION

For the reasons set forth hereinabove, it is respectfully submitted that this petition for certiorari be accorded expedited consideration and that it be granted; that this petition be considered our brief on the merits if certiorari is granted; and that, on the merits, the decision below be reversed and the injunction vacated.

Respectfully submitted,

BERNARD KLEIMAN
10 South LaSalle Street
Chicago, Illinois

ELLIOT BREDHOFF
MICHAEL GOTTESMAN
GEORGE COHEN
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

NATHAN LIPSON
ALFRED LAWSON
1500 Commonwealth Building
Pittsburgh, Pa. 15222

Attorneys for Petitioners

APPENDIX

OPINION OF THE DISTRICT COURT

* * * *

THE COURT: Are all parties here? Gentlemen, if you do not mind, the Court has a bad cold and the flu and I have a preliminary statement that I would like to read, and I will have Mr. Wilson read it, if you do not mind, for the record.

PRELIMINARY STATEMENT

"The Government of the United States petitions the Court for a Preliminary Injunction against the Union Carbide Corporation and the United Steelworkers of America, AFL-CIO, Local 2958, United Steelworkers of America, AFL-CIO, located in Kokomo, Indiana, where the Haynes Stellite Division of the Union Carbide Corporation are manufacturers of a special high temperature special purpose metal alloy which is used to fabricate combustion liners used on certain jet planes and in blades and vanes which are critical production components of military helicopters. The alloy is known as "Hastelloy X."

"Plaintiff prays for an injunction in accordance with the provisions of the Labor-Management Relations Act, Section 178, to restrain personnel of Haynes Stellite Division of Union Carbide Corporation at Kokomo, Indiana, from continuing or taking part in any strike or lockout at the plaintiff's plant, and the Union from encouraging, ordering or taking part in any strike at said plant.

"This particular matter presents two fundamental questions as set forth in the statute: whether or not the strike or lockout (1) affects an entire industry or a sub-

stantial part thereof engaged in trade, commerce, transportation, transmission or communication among the several states or with foreign nations or engaged in the production of goods for commerce; and (2) if permitted to occur or continue, will imperil the national welfare or safety.

"The Court, after hearing oral argument of counsel and having opportunity to review the pleadings, affidavits and points and authorities submitted herein, finds:

"That the strike at the Kokomo plant raises the issue as to what is an 'industry' under the provisions of Section 178(a)(1) of the Labor-Management Relations Act.

"Under Section 142 of that Act the term 'industry affecting commerce' means 'any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce, or tend to burden or obstruct commerce, or the free flow of commerce.'

"The Court finds that the strike at the Kokomo plant does have a substantial effect on the industry of production of military aircraft engines and therefore is encompassed within the Act.

"The Court has no difficulty with the second question presented—that is affecting the safety of the country—in view of the evidence submitted.

"The Court therefore signs the Order submitted by the plaintiff and the Findings of Fact and Conclusions of Law submitted by plaintiff, the United States of America.

"That is to say, the Court grants the Preliminary Injunction."

JUDGMENT OF THE COURT OF APPEALS

[Caption Omitted]

Before: Fahy, McGowan, and Leventhal, Circuit Judges.

JUDGMENT

On consideration of the record on appeal from the United States District Court for the District of Columbia, and the pleadings filed by the parties herein, and counsel for the parties, at the time of hearing on appellants' motion for stay, having stipulated that this case may be treated as submitted for final decision on the merits and pleadings now on file herein in this cause, it is, for the reasons set forth in the accompanying opinion,

ORDERED and ADJUDGED by this Court that the order of the District Court appealed from in this cause be, and it is hereby affirmed, and it is

FURTHER ORDERED and ADJUDGED by this Court that the order of this Court entered December 22, 1966, granting appellants' motion for stay shall remain in effect until 5 P.M. December 23, 1966.

Per Curiam.

OPINION OF THE COURT OF APPEALS

Per Curiam: The District Court, on December 21, 1966, issued a preliminary injunction, under the National Emergencies provisions of the Labor Management Relations Act, 29 U.S.C. §§ 176-180, against the continuation of a strike by the Steelworkers at a Union Carbide plant in Kokomo, Indiana. The following day the matter came on before us on the union's motion for a stay pending appeal. In the course of the argument of that motion, all parties stipulated that the case should be regarded as submitted to us on the merits. In the light of this development, we stayed the injunction

until 5:00 P.M. on December 23. For the reasons set forth below in necessarily brief compass, and pursuant to a purpose to do so communicated by us to the parties on the afternoon of December 22, we affirm the District Court and decline to extend our stay beyond the originally appointed time.

Eleven Union Carbide plants in all have been struck, but injunctive relief has been sought by the United States in respect of only one. This is the so-called Stellite Division, which produces a high temperature metal alloy used by aircraft engine manufacturers. As contemplated by the Act, the President convened a board of inquiry and, upon receipt of its findings, directed the Attorney General to seek an injunction ending the strike for 80 days. The matter was heard in the District Court on affidavits, and upon oral and written representations, submitted by the parties. The injunction issued upon findings of fact and conclusions of law formulated by the District Court after this hearing.

The central finding is that the strike, if permitted to continue, "will affect a substantial part of the military aircraft engine industry" engaged, within the meaning of the Act, in interstate and foreign commerce, or in the production of goods for such commerce. It is further found that the strike will affect the National Safety in that:

(1.) A manufacturer supplied by the Stellite Division is the sole producer of engines and spare parts for military aircraft known as the F-4, the RF-4, and the F-104. All these aircraft are variously being used by the Navy and Air Force in combat and reconnaissance operations in Southeast Asia. The metal alloy in question, of which the Stellite Division is the major producer, is required in the fabrication of combustion liners which enable the engines to perform under the extremely high temperatures generated by the burning of jet engine fuel. Since the only other producer of this alloy under license from the Stellite Division is supplying other priority requirements, there is no other source available to

enable the manufacturer to meet its delivery schedules, and existing stocks will shortly be exhausted, all to the detriment of our national safety.

(2) The Stellite Division also produces turbine blades essential in the engines which power the helicopters known as the CH-53, the CH-46, and the SH3D. The first two of these classes are used by the Marine Corps in combat in Southeast Asia, and the last is used in the Navy's antisubmarine warfare programs. There is no alternate source of the castings for these blades which can maintain the existing production schedules of the manufacturer making these engines.

(3) The Stellite Division supplies certain first and second stage turbine blades and vanes for the engines powering the UH-1 and CH-47 helicopters. These aircraft are used by the Army in Southeast Asia for combat, as well as for the transportation of troops, supplies, and artillery, and for fire support of ground troops. The strike has resulted in inadequate stocks of blades and vanes to permit the rebuilding of old engines to replace worn and combat-damaged engines in Southeast Asia, and to maintain production schedules of new engines.

It is further found that, by reason of the foregoing circumstances, the strike will result in an irretrievable loss of time in the supply of weapons systems essential to the national defense and security of the United States, with particular reference to current combat operations in Southeast Asia. There are no other sources from which sufficient quantities of the necessary materials and parts can be obtained in time to maintain levels of aircraft and helicopter engines requisite to meet adequately our military necessities, all to the imperilment of our national safety, and with irreparable damage to the United States for which there is no adequate remedy at law.

Although the union does not accept these findings, the principal thrust of its argument to us was, by its own char-

acterization, not directed towards overturning them. It asserts, rather, that it is not enough for a successful invocation of Taft-Hartley merely to establish that the ending of the strike would relieve pressures antipathetical to our national safety. There must, in addition, be a showing that the strike, in the language of the Act, "affects an entire industry or a substantial part thereof"; and that the District Court's finding to this effect is, on this record, conclusionary at best.

We do not agree. To the extent that the union's position derives from a contention that Congress conceived of the emergency provisions of Taft-Hartley as confined to the ending of work stoppages in the industry in which the striking employees are immediately engaged (in this instance, the metal alloys industry as distinct from the manufacture of military aircraft engines), it is disposed of to our satisfaction by *United States* v. *United Steelworkers (American Locomotive Company)*, 202 F.2d 134 (2nd Cir. 1953). In any event, the President did not direct the invocation of Taft-Hartley in respect of the metal alloys industry. His problem was with the effect of the strike upon the military aircraft engine industry; and, in our view, any strike which affects that industry, or a substantial part thereof, falls within the reach of the Congressional concern which gave rise to the emergency provisions of Taft-Hartley. Thus, the availability of those provisions in this case turns upon whether there is in fact an industry identifiable as the military aircraft engine industry; and, if there is, whether that industry has, either in its entirety or in substantial part, been affected by this strike to the jeopardy of our national safety.

The first part of this inquiry presents minimal difficulties.[1]

---

[1] The union's affidavits assert that there is only one aircraft engine industry, making engines for both military and civilian uses. But these same affidavits indicate that some 23% of all engines produced are for military purposes, and that 29% of all the employees of this allegedly single industry worked on military engines, producing 18% of the total dollar volume of shipments. It is also conceded that the strike in issue

That there is in this country a tangible commitment of extensive resources of capital, technological skill, and manpower to the building of aircraft engines designed for use in military aircraft is evident from this record, especially when read with the common sense which should inform the judicial process as any other. The President, in using this term, was not devising an imaginary construct, nor was the District Court.

In respect of the second branch of the inquiry, the statute does not embody an all-or-nothing approach. The District Court did not have to find that the "entire" military aircraft engine industry was affected, but only that a significant segment of it was. This record arguably does not admit of an identification in concrete terms of the total resources of this country employed in the manufacture of military aircraft engines. But, in the light of what is common knowledge of the magnitude of the effort this nation is being called upon to make in Southeast Asia, it is impossible to read what is in this record of the types and functions of the aircraft involved without concluding that their availability in adequate numbers to every branch of the armed services rests upon a resource commitment of a very substantial nature indeed. Our industrial might—in aircraft engine manufacture as elsewhere—is great, but it is not unlimited. We would overestimate it sadly if we were to conclude, on this record, that an effort of very substantial proportions is not required of

---

may affect as many as 16,500 workers, representing 13% of the total industry employees. These figures impress us as supporting a discernible division between military and civilian production. Further, the union's affidavits indicate that there is no dispute that the alloy made by the Stellite Division is a component of the engines powering the particular types of aircraft identified in the District Court's findings. There is some effort by the union to assert that other sources of the alloy can be found, but we do not think there is any serious showing that these could meet within any reasonable time the crisis which has prompted the President to act.

the military engine aircraft industry to keep these planes and helicopters moving steadily to the area of critical need.

It may be, as the union urges, that there are means other than Taft-Hartley by which this strike could be ended. But the question now is whether Congress intended the limited restrictions of Taft-Hartley upon the right to strike to be available to the President under the circumstances which have—rationally, we think—been found to obtain here. We do not find the District Court's answer to be wanting in either factual or legal foundation. Its judgment is accordingly

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 966

UNITED STEELWORKERS OF AMERICA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

At the direction of the President of the United States, the Acting Attorney General brought suit under the National Emergency provisions of the Labor-Management Relations Act of 1947, 61 Stat. 155, as amended, 29 U.S.C. 176–180, for an injunction against the continuation of a strike by the United Steelworkers of America at the Stellite Division (Kokomo, Indiana) plant of Union Carbide Corporation.[1] Before directing commencement of this suit, the President had determined (following the report of a

[1] The government did not seek to enjoin strikes by petitioners at ten other Union Carbide plants, commenced simultaneously with the instant strike on September 29, 1966.

243-276—67——1

Board of Inquiry appointed by him, pursuant to Section 206 of the Act, 29 U.S.C. 176, which found that early settlement of the labor dispute was unlikely) that the strike "affects a substantial part of the military aircraft engine industry of the United States * * * [and], if permitted to continue, will imperil the national safety."

The district court was authorized by the Labor-Management Relations Act of 1947 to enjoin the continuation of the strike upon finding that it

> (i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and
>
> (ii) if permitted to occur or to continue, will imperil the national health or safety * * *. [Section 208(a), 29 U.S.C. 178(a).]

On December 21, 1966, the court found that the strike at the Stellite Division "will affect a substantial part of the military aircraft engine industry" and "will imperil the national safety, and thereby cause irreparable damage and injury to the United States, for which there is no adequate remedy at law" (App., *infra*, 13, 16). Accordingly, it issued a preliminary injunction against continuation of the strike.[2] On December 22, 1966, in the course of oral argument on

[2] Under the Act, the injunction remains in effect at most for eighty days. 29 U.S.C. 179(b), 180. During that period, the union and employer have the "duty * * * to make every effort to adjust and settle their differences, with the assistance of the [Federal Mediation and Conciliation] Service * * *." 29 U.S.C. 179(a).

petitioners' motion to the court of appeals for a stay of the injunction pending appeal, the parties stipulated that the court consider the case on its merits, and on December 23, 1966, the District of Columbia Circuit (per Judges Fahy, McGowan, and Leventhal), agreeing with the district court's findings and conclusions, affirmed the issuance of the injunction (Pet. App. 39).

The court of appeals rejected petitioners' principal argument—that there is no separate military aircraft engine industry apart from the general aircraft engine industry and that therefore the district court's findings that the strike (in the language of the Act) "affects an entire industry or a substantial part thereof" was unsupported by the record. The court further held, in accordance with the decision of the Second Circuit in *United States* v. *United Steelworkers of America*, 202 F. 2d 132, certiorari denied, 344 U.S. 915, that injunctive relief under the Act is available even though the industry affected by the strike (in this case the military aircraft engine industry) is not the industry in which the striking employees are immediately engaged (the metal alloys industry).

Petitioners challenge the factual findings of both courts below—in full agreement with prior findings of the President of the United States[3]—that the

[3] The concurring opinion of Justices Frankfurter and Harlan in *United Steelworkers of America* v. *United States*, 361 U.S. 39, points out that (*id.*, at 48): "[U]nder § 208 the trier of these facts was called upon to make a judgment already twice made by the President of the United States: once when he convened

strike at the Stellite Division affects a substantial part of an industry. They also seek review of the ruling that a strike may be enjoined under the Act even though the industry that it "affects" is not the immediate one in which the strike has occurred.[4] The correctness of factual findings concurred in by two courts below does not warrant re-examination by this Court. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. At all events, the decision below is supported by the evidence, is plainly correct, and is not in conflict with the decision of any other court. There is accordingly no basis for further review.

It is undisputed that, if permitted to continue, the strike at the Stellite Division of Union Carbide Cor-

---

the Board of Inquiry; and once when he directed the Attorney General to commence this action. His reasoned judgment was presumably based upon the facts we have summarized, and it is not for us to set aside findings consistent with them. The President's judgment is not controlling; § 208 makes it the court's duty to 'find' the requisite jurisdictional fact for itself. But in the discharge of its duty a District Court would disregard reason not to give due weight to determinations previously made by the President, who is, after all, the ultimate constitutional executive repository for assuring the safety of the Nation, and upon whose judgment the invocation of the emergency provisions depends."

[4] Petitioners further urge (Pet. 20) that the President had available means other than the National Emergency provisions of the Labor-Management Relations Act for securing the material manufactured by the Stellite Division (citing Section 18 of the Selective Service Act of 1948, 50 U.S.C. App. 468; Defense Production Act of 1950, 50 U.S.C. App. 2071) and presumably, therefore, should not have followed the course he chose. There is, however, no indication in any of those statutes that Congress intended the President to exhaust his powers under the Selective Service Act and/or Defense Production Act before resorting to the National Emergency provisions.

poration would have "imperil[ed] the national health or safety" (29 U.S.C. 178(a)(ii)). As both courts below found: *First*, the Stellite Division is the major producer of a high temperature, special purpose metal alloy (Hastalloy X) which is essential to the fabrication of engines and spare parts for aircraft (the F–4, the RF–4, and the F–104) in constant use by the Navy and Air Force in combat and reconnaissance operations in Southeast Asia. Since the only other producer of this alloy is supplying other priority requirements, no other source is available and existing stocks would soon be depleted if the strike were to continue. *Second*, the Stellite Division produces turbine blades which are an essential part of the engines for helicopters used extensively by the Marine Corps in Southeast Asia combat operations (the CH–53 and CH–46), and by the Navy in antisubmarine warfare programs (the SH3D). There is no alternative source for the castings for these blades which can maintain existing production schedules of the manufacturer making these engines and spare parts for the engines currently in use in Southeast Asia. *Third*, the Stellite Division supplies certain first and second stage turbine blades and vanes for the engines powering the helicopters (the UH–1 and CH–47) which form a vital part of the Army's combat force in Southeast Asia. Since no other source can meet these requirements, the strike had resulted in inadequate stocks of blades and vanes to permit the rebuilding of worn and combat-damaged engines in Southeast Asia and to maintain production schedules of new engines.

Petitioners dispute the findings of the district court and the court of appeals that a substantial part of an industry was affected by the strike at the Stellite Division. However, their claim that there is no industry identifiable as the *military* aircraft engine industry ignores the evidence and reality. A table of the Bureau of the Census' *1963 Census of Manufactures*, introduced in evidence below, indicates that more than 83 percent of the total dollar value of shipments of aircraft engines and parts is made to the Department of Defense and NASA, principally the former. Moreover, as the court of appeals noted, petitioners' affidavits concede that 23 percent of all aircraft engines produced in the United States are for military purposes and 29 percent of all employees engaged in the aircraft engine industry work on military shipments (Pet. App. 42, n. 1). In view of this evidence, the finding of both courts below that there is a military aircraft engine industry is, we submit, plainly correct.

It is equally clear that the strike at the Stellite Division, in the language of the Act, "affects * * * a substantial part" of the military aircraft engine industry. Petitioners conceded, as the court of appeals pointed out, "that the strike in issue may affect as many as 16,500 workers, representing 13% of the total industry [*i.e.*, the entire aircraft engine industry, including the military aircraft engine industry]" (Pet. App. 42–43, n. 1). Plainly, therefore, a very substantial number of persons and financial resources would be affected were this strike permitted to continue. But the courts below were not required to identify in

precise terms the value of human and monetary resources engaged in the production of military aircraft engines and parts for such engines, and then to compute to the decimal point the percentage of total resources affected if the strike were permitted to continue. Rather, as the court of appeals concluded (Pet. App. 43–44):

> [I]n the light of what is common knowledge of the magnitude of the effort this nation is being called upon to make in Southeast Asia, it is impossible to read what is in this record of the types and functions of the aircraft involved without concluding that their availability in adequate numbers to every branch of the armed services rests upon a resource commitment of a very substantial nature indeed. Our industrial might—in aircraft engine manufacture as elsewhere—is great, but it is not unlimited. We would over-estimate it sadly if we were to conclude, on this record, that an effort of very substantial proportions is not required of the military engine aircraft industry to keep these planes and helicopters moving steadily to the area of critical need.

Petitioners further argue that injunctive relief is authorized by the Act only if the "entire industry or a substantial part thereof" which the strike "affects" (29 U.S.C. 178) is the immediate industry in which the strike occurs (Pet. 13, 22). This argument has been correctly rejected by both of the courts of appeals that have considered the question. As the Second Circuit pointed out in *United States* v. *United Steelworkers of America, supra*, 202 F. 2d 132, 137,

arguments of this nature ignore the language used by Congress in the statute:

> By using "affects" instead of some more confining word as regards the strike or lock-out which might be enjoined it made, we think, the test of applicability not merely the extent of the strike within an industry but the extent of the effect of a strike upon an industry and the national health or safety. Such a construction is in accord not only with the usual meaning of the words used but also with the purpose and policy of the entire statute * * *. [See, to the same effect, the opinion of the court of appeals in the present case (Pet. App. 42).]

Had Congress intended the statute to be read as authorizing an injunction only if the strike "affects *the entire industry in which the strike or lock-out is threatened or has occurred* or a substantial part thereof" it would have written the statute in those terms. Congress did not so provide; it said instead that the strike may be enjoined if it "affects an entire industry or a substantial part thereof."[6] Applying, as the courts

[6] In view of this plain statutory language, petitioners' extensive discussion of legislative history (Pet. 22–29) has little significance. See, *e.g.*, *Ex parte Collett*, 337 U.S. 55, 61. In any event, the bulk of the material cited is inapposite since it deals not with the question at hand but with the varying views of the legislators as to whether a strike to be enjoined must be nation-wide. And Senators Taft, Ball, and Smith, whose statements petitioners quote, were not speaking for the majority of the Senate Committee or the Senate. Their view—that the question of national emergency strikes was principally one of nation-wide strikes caused by industry-wide bargaining and could, therefore, be controlled by placing restrictions on industry or nation-wide bargaining—failed to carry either the Committee or the Senate. See S. Rep. No. 105, 80th Cong., 1st Sess., Suppl. views, pp. 50, 51, 56; 93 Cong. Rec. 4676.

below did, the plain language of the Act, the strike involved in this case was covered.[6]

For the foregoing reasons, the petition for a writ of certiorari should be denied.[7]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

BAREFOOT SANDERS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
MARTIN JACOBS,
Attorneys.

JANUARY 1967.

---

[6] Apart from its irrelevance, there is no substance to petitioners' suggestion (Pet. 21) that the employees of the Stellite Division necessarily will be subject during the term of the injunction to the terms of the expired contract. It is possible that the new contract between petitioners and Union Carbide, when executed, will provide for a retroactive application of its terms and conditions.

[7] If, contrary to our submission, this Court grants a writ of certiorari, we have no objection to an accelerated schedule of briefing and argument, as requested by petitioners (Pet. 1–2, 36.)

243-276—67——2

APPENDIX

In the United States District Court for the District of Columbia

CIVIL No. ——

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNION CARBIDE CORPORATION, A NEW YORK CORPORATION; UNITED STEELWORKERS OF AMERICA, AFL–CIO; LOCAL 2958, UNITED STEELWORKERS OF AMERICA, AFL–CIO, DEFENDANTS

Findings of Fact and Conclusions of Law

This cause having come on for hearing on the motion of the plaintiff for a preliminary injunction, as prayed for in its verified complaint, and the Court having considered all evidence submitted herein, the pleadings, memoranda of law, and arguments of counsel, make the following Findings of Fact and Conclusions of Law with respect to said application.

FINDINGS OF FACT

1. On or about September 30, 1966, certain employees of the Union Carbide Corporation (hereinafter referred to as "the Corporation") and represented by the following labor organizations:

United Steelworkers of America, AFL–CIO
Local 2958, United Steelworkers of America,

AFL-CIO (hereinafter referred to as the Union defendants)

commenced a strike against the Corporation.

2. The strike results from an unresolved labor dispute and will be, if permitted to continue, a concerted work stoppage and not the exercise of the rights of individual employees to quit their labor, as provided in Section 502 of the Labor Management Relations Act, 1947.

3. On December 19, 1966, the President of the United States acting under the provisions of Section 206 of the Act (29 U.S.C. 176), issued Executive Order No. 11321, whereby he appointed a Board of Inquiry to inquire into the issues involved in said labor dispute. In said Executive Order the President expressed the opinion that such dispute had resulted in a strike which, if permitted to continue, would affect a substantial part of the military aircraft engine industry, an industry engaged in trade, commerce, transportation, transmission or communication among the several States and with foreign nations, or engaged in the production of goods for commerce, and that such strike, if permitted to continue will imperil the national safety.

4. The Board of Inquiry so convened by the President inquired into the issues involved in the dispute and rendered its written report to the President.

5. Upon receipt of the report, the President, on December 21st, 1966, directed the Attorney General, pursuant to the provisions of Section 208 of the Act, to petition in the name of the United States any district court of the United States having jurisdiction of the parties to enjoin the strike, and for such other relief as may be necessary or appropriate.

6. Thereupon, on December 21st, 1966, the Attorney

General brought this action on behalf of the United States of America.

7. This suit was instituted under the National Emergencies provisions of the Act, Sections 206–210 (29 U.S.C. 176–180).

8. Copies of the verified complaint and annexed affidavit of the Deputy Secretary of Defense, together with copies of the Plaintiff's Motion for a Preliminary Injunction and supporting memorandum of law were served upon all defendants, who accepted service.

9. The threatened strike, if permitted to continue, will affect a substantial part of the military aircraft engine industry, which industry is engaged in trade, commerce, transportation, transmission or communication among the several States and with foreign nations, or in the production of goods for commerce.

10. The strike, if permitted to continue, will affect the National Safety, as follows:

(*a*) A customer of the Union Carbide Corporation is the sole producer of engines and certain spare parts for the F–4 (Phantom), the RF–4 (a reconnaissance version of the F–4) and the F–104 aircraft. The F–4, used by both the Navy and the Air Force is the most modern tactical fighter available to our fighting forces today, and has been assigned to combat operations in Southeast Asia under the highest priority and is in constant and ever-increasing use to perform a variety of combat missions such as strafing and bombing. The F–104 is a high altitude fighter cover aircraft and is also in constant use in Southeast Asian combat situations. The Stellite Division of the Union Carbide Corporation, Kokomo, Indiana, is the major producer of a certain high temperature special purpose metal alloy which is used to fabricate combustion liners.

These combustion liners are manufactured and used by the manufacturer in the production of engines and spare parts therefor for the above-mentioned aircraft. These combustion liners are required to enable the engine to perform under the extremely high temperatures generated by the burning of jet fuel and the special purpose metal alloy produced by the Stellite Division is essential to the manufacture of such combustion liners. As the only other producer of this metal alloy is already supplying other priority requirements, there is no source with available capacity sufficient to enable the jet engine manufacturer to produce the necessary combustion liners to meet its required delivery schedules for these engines and spare parts therefor. As a result of the current work stoppage, existing stocks of this material supplied by the Stellite Division, and necessary to continue the manufacture of combustion liners, will shortly be exhausted. Since the manufacturer's production facilities for these engines are scheduled to operate at capacity and there is a need for uninterrupted production of combustion liners, there will result an unavoidable and irretrievable loss of essential engine and spare parts production to the detriment of our national safety.

(*b*) The Stellite Division of Union Carbide Corporation also produces turbine blades which are an essential part of the helicopter engines used to power the CH–53, CH–46 and SH3D helicopters. The CH–53 and CH–46 are used extensively by the Marines in combat operations in Southeast Asia. The SH3D is used in the Navy's antisubmarine warfare programs. The Stellite Division of Union Carbide Corporation produces

turbine blade castings which are later machined and supplied to the engine producer. There is no alternate source from which a sufficient number of these castings can be obtained in time to meet the requirements for scheduled engine production. If the current work stoppage at the Stellite Division continues the requirements of the General Electric Company will not be met, thus seriously interfering with the production of these engines and spare parts therefor, to the detriment of our national safety.

(*c*) The Stellite Division of Union Carbide Corporation also supplies certain first and second stage turbine blades and vanes which are critical production components of helicopter engines for the UH–1 (Huey) and CH–47 (Chinook) helicopters. These helicopters form a vital part of the Army's combat force in Southeast Asia and are constantly used to perform a wide variety of missions including the transportation of troops, supplies and artillery into close combat situations and actual fire support of ground troops. As a direct result of the strike at the Stellite Division of the Union Carbide Corporation at Kokomo, Indiana, there are insufficient numbers of blades and vanes being delivered to accomplish rebuilding of old engines which are required as replacements for worn and combat damaged engines in Southeast Asia, and also to continue manufacture of new engines as scheduled. Since no other production sources can meet these requirements for blades and vanes, the work stoppage has resulted in an unavoidable and irretrievable loss of essential engine production for aircraft needed in Southeast Asia to the detriment of our national safety.

(*d*) The work stoppage at the Stellite Division of Union Carbide Corporation, Kokomo, Indiana, will result in an irretrievable loss of time in the supply of weapons systems essential to the national defense and security of the United States including, particularly, combat operations in Southeast Asia. There do not now exist any other sources from which sufficient quantities of the necessary material and parts can be obtained in time to assure our ability to maintain sufficient levels of the aircraft and helicopter engines referred to above in support of our military necessities.

11. The strike, if permitted to continue, will imperil the national safety and thereby cause irreparable damage and injury to the United States, for which there is no adequate remedy at law.

CONCLUSIONS OF LAW

1. This action was properly instituted under the National Emergencies provisions of the Labor Management Relations Act, 1947 (29 U.S.C. 176–180).

2. The statutory provisions of Sections 206 to 208 (29 U.S.C. 176–178) of the Act and all requirements contained therein, were in all respects duly and legally complied with, both prior to and in the commencement of this suit by the United States of America.

3. The Court has jurisdiction of the subject matter of this suit and of the parties.

4. The strike on the part of the union defendants does not constitute an exercise of the right of the individual employees to quit their labor as set forth in Section 502 of the Act (29 U.S.C. 143).

5. The strike, if permitted to continue, will affect a substantial part of an industry engaged in trade, commerce, transportation, transmission and communica-

tion among the several States and with foreign nations, or engaged in the production of goods for commerce.

6. The strike, if permitted to continue, will imperil the national safety, and thereby cause irreparable injury to the United States of America, for which there is no adequate remedy at law.

7. Plaintiff, the United States of America, is entitled to the relief prayed for.

/s/ LEONARD P. WALSH,
United States District Judge.

DECEMBER 21, 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1967

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 18 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 966

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and Its LOCAL UNION 2958, *Petitioners,*

v.

UNITED STATES OF AMERICA

and

UNION CARBIDE CORPORATION, *Respondents.*

BRIEF OF RESPONDENT UNION CARBIDE CORPORATION OPPOSING PETITION FOR WRIT OF CERTIORARI

GUY FARMER
JOHN A. McGUINN
1120 Connecticut Avenue, N.W.
Washington, D. C. 20036

WILLIAM C. TERANCE
270 Park Avenue
New York, New York

Attorneys for Respondent Union Carbide Corporation

Printed by Byron S. Adams Printing, Inc., Washington, D. C.

TABLE OF CONTENTS

	Page
Question Presented	3
Counterstatement of the Case	3
Argument	6
1. Use of the Customer Industry Rather Than the Struck Industry and the Application of the Act to a Strike at a Single Plant	7
2. The Existence of a Military Aircraft Engine Industry	12
3. The Strike Affects a Substantial Part of the Military Aircraft Engine Industry	14
Conclusion	17

TABLE OF CITATIONS

CASES:

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 14
Steelworkers v. United States, 361 U.S. 39 .....2, 6, 7, 17
United States v. United Steelworkers Union (American Locomotive Co.), 202 F. 2d 132 (2d Cir. 1953), cert. den., 344 U.S. 915 .....7, 8, 9, 11, 12

LEGISLATIVE MATERIALS:

Hearings Before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong., 2d Sess., on National Emergency Disputes Act 10, 11
93 Cong. Rec. 6679 (Remarks of Senator Pepper) ... 10

MISCELLANEOUS:

Daily Labor Report (Bureau of National Affairs) No. 6 (Jan. 10, 1967), p. B-1 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 966

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and Its LOCAL UNION 2958, *Petitioners,*

v.

UNITED STATES OF AMERICA

and

UNION CARBIDE CORPORATION, *Respondents.*

BRIEF OF RESPONDENT UNION CARBIDE CORPORATION OPPOSING PETITION FOR WRIT OF CERTIORARI

Respondent Union Carbide, the employer, opposes the petition for a writ of certiorari. Union Carbide was a defendant in the injunction proceeding in the District Court and is bound by the injunction issued by that Court and affirmed by the judgment of the Court of Appeals. Union Carbide did not oppose or appeal the issuance of the injunction. The order en-

joins the Union from continuing the strike and orders both parties to continue good faith negotiations in an effort to resolve the dispute. Union Carbide asserts no private interest in continuing the injunction, but does believe that the public interest would not be served by setting aside the order of the court below.

The injunction was issued upon the finding of the District Court and the Court of Appeals that the strike at the Kokomo, Indiana, plant of Union Carbide affected a substantial part of an industry and imperiled the national safety. These are the statutory standards as defined by this Court in *Steelworkers* v. *United States,* 361 U.S. 39, for the invocation of the national emergency provisions of the law. Petitioners do not claim that these standards were not applied, but rather that one of them was applied incorrectly. It is conceded that the strike imperils the national safety. But it is claimed there is a lack of evidence to show that a substantial part of an industry was affected by the strike.

This does not present a question for certiorari under the standards of review established by this Court. The Court has repeatedly said that it does not sit as an appellate court to correct alleged factual errors made by the lower court. This is the function of the Court of Appeals, and that Court has in a unanimous opinion affirmed the critical findings of the District Court. The two courts below have concurred in finding, in agreement with the President, that the strike imperiled the national safety and affected a substantial part of the military aircraft engine industry. No grounds have been stated for the issuance of a writ of certiorari to review those essentially factual findings.

The lifting of the injunction at this stage and the resumption of the strike would, beyond question, recreate in an aggravated form the admitted danger to the national safety arising from the cessation of the production of critical defense materials at the Kokomo plant.

QUESTION PRESENTED

Whether there are "special and important reasons" for this Court to review a judgment of a Court of Appeals upholding findings of a District Court, pursuant to Sections 206-210 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §§ 176-180, that the strike at the Stellite Division of the Union Carbide Corporation, Kokomo, Indiana, if permitted to continue, would affect a substantial part of the military aircraft engine industry and imperil the national safety.

COUNTERSTATEMENT OF THE CASE[1]

On September 29, 1966, the Union struck the Kokomo plant of the Union Carbide Corporation, together with ten other plants of the same company. The Kokomo plant employs some 2,100 employees.

The Kokomo plant is the major producer of a certain high temperature special purpose metal alloy (Hastalloy X),[2] which is used to fabricate combustion liners in connection with engines for certain jet aircraft cur-

---

[1] Respondent Union Carbide Corporation concurs in all respects with the factual presentation made by the government through its verified affidavits.

[2] The only other producer of Hastalloy X is a licensee of the Union Carbide Corporation, Universal Cyclops Company. That company has informed the government that delivery of the alloy could not be made until the latter part of 1967 (Goldsworthy affidavit, para. 3).

rently being used in combat operations in Southeast Asia, as well as other places. (Vance affidavit, paras. 4 and 5). The aircraft engines in question are manufactured solely by the General Electric Company (Vance affidavit, para. 4). The alloy produced by the Kokomo plant is essential to enable the engine to perform under the extremely high temperatures generated by the burning of jet fuel. (Vance affidavit, para. 5).

Without the injunction, existing supplies of the alloy would have been completely exhausted by December 30, 1966, and it is estimated that it would take five weeks after the resumption of production at the struck plant before the alloy could be produced and supplied to the manufacturer of the jet engines. (Vance affidavit, para. 5, and Goldsworthy affidavit, para. 3).

The record further shows that should another company be licensed to produce Hastalloy X, there would be at least a nine-month delay in obtaining production from such new source. (Goldsworthy affidavit, para. 4).

Moreover, even though there are other alloys that may have essentially the same properties as Hastalloy X, these other alloys could not be used in the cumbustion liners for these jet aircraft engines until an extensive and time-consuming testing procedure had been completed, taking at least ten months (Goldsworthy affidavit, para. 5).

The Kokomo plant produces turbine blade castings which are later machined and supplied to the General Electric Company for use in connection with the production of engines and spare parts for helicopters being used in the conflict in Southeast Asia. The Gen-

eral Electric Company is the sole producer of engines and spare parts for these helicopters. There is no alternate source from which General Electric can obtain a sufficient number of such castings in time to meet its requirements for scheduled engine production (Vance affidavit, para. 6).

The Kokomo plant also produces certain first and second stage turbine blades and vanes which are sold to the Lycoming Division of AVCO Corporation. Lycoming is the sole producer of engines and spare parts for two classifications of helicopters being used in the Southeast Asia conflict. No other production source can meet this requirement for blades and vanes.

The District Court made detailed findings of fact based on the evidence adduced through the verified affidavits, finding that the strike if permitted to continue would affect a substantial part of the military aircraft engine industry and would adversely affect the national safety (Finding nos. 9 and 10). Concluding that the statutory criteria for obtaining relief under Sections 206 through 210 of the Labor-Management Relations Act of 1947, as amended, had been thus fulfilled, the Court issued a preliminary injunction, customary in form to injunctions issued pursuant to these statutory provisions in other cases.

The Court of Appeals found nothing in the record to disturb the findings made by the District Court, and after disposing of the various arguments put forward by petitioners, affirmed the judgment of the District Court, *per curiam* (Judges Fahy, McGowan and Leventhal).

ARGUMENT

There Are No "Special and Important Reasons" for This Court To Review on a Writ of Certiorari the Findings Based on the Evidence Adduced That the Strike Involved in This Case Met the Statutory Conditions of Breadth of Involvement and Peril to the National Health and Safety.

This Court's rule respecting the considerations governing review on certiorari makes it amply clear that review will be granted only where there are "special and important reasons therefor" (Rule 19). The petitioners assert that the present case involves the decision of "an important question of federal law which has not been, but should be, settled by this Court." The decision of the Court of Appeals, however, involves merely the question of whether there was sufficient evidence to support the District Court's finding that the strike affected a substantial part of an industry in commerce.[8] The Court of Appeals had no difficulty in finding substantial evidence to support the District Court's finding. The question presented was essentially one of fact and hinged on the determination that the strike affected a substantial part of the military aircraft engine industry. The resolution of that question does not involve an important question of federal law, nor are any other special or important reasons assigned by the union petitioners for the granting of the writ.

This Court dealt definitively with the "national emergency" provisions of the Taft-Hartley law in 1959 in *Steelworkers* v. *United States,* 361 U.S. 39.

---

[8] The union petitioners made no effort in the courts below to challenge the evidence that the strike imperiled the national health or safety.

There the Court clearly defined the role of the judiciary in such disputes, holding:

> "The statute imposes upon the Court the duty of finding, upon evidence adduced, whether a strike or lockout meets the statutory conditions of breadth of involvement and peril to the national health and safety." 361 U.S. at 41.

The rulings of the courts below were made with manifest fidelity to the statutory standards as they were construed by the Court in the *Steelworkers* case. Petitioners argue only that these standards were misapplied on the facts of this case. This presents at most a question of substantiality of the evidence, which is a question that this Court has traditionally left for the courts below to decide.

Since the petitioners have addressed their brief to the merits, brief comments will be directed at their arguments.

1. Use of the Customer Industry Rather Than the Struck Industry and the Application of the Act to a Strike at a Single Plant.

The first argument of the petitioners is that the government is limited by the Act to the industry in which the strike is taking place in determining whether a substantial part of "an industry" is affected, and that the government is prohibited from looking to the "customer industry" (the industry purchasing the struck product) as the standard. Coupled with this argument, the petitioners contend that the Act was not intended to apply to a strike at a single plant.

Both of these contentions were made fourteen years ago by the Steelworkers Union in *United States* v. *United Steelworkers Union (American Locomotive*

Co.), 202 F. 2d 132 (2d Cir. 1953), *cert. den.*, 344 U.S. 915. In the *American Locomotive* case, the union struck the Dunkirk, New York, plant of the Company which produced "heat exchanger shells used in the production of heavy water needed to operate nuclear reactors," and sold this product to prime contractors of the AEC who were constructing facilities needed to produce atomic bombs. The struck company was in an industry known as the "heat exchanger, pressure vessel and prefabricated pipe industry," which the Court found was not affected in substantial part by the strike. The Court, however, found that the strike affected a substantial part of the customer's industry—the atomic weapon industry, and that this sufficed for the purposes of the statute.

The courts below adopted the same view of the statute, and there is no contrary authority. The interpretation appears eminently sound. The statute refers in explicit terms to the industry "affected", not the industry in which the strike occurs. In this case, as in *American Locomotive,* the strike directly affected the so-called "customer" industry. The effect was not remote, indirect or speculative, but direct, immediate and critical.

In *American Locomotive,* the Court also dealt with the contention that the emergency provisions were not intended to apply where a single plant was involved. On this point, the Court held:

> "The obvious purpose of the instant statute was to provide some means for protecting the national health and safety when that was imperiled by a strike or a lock-out which burdened or obstructed commerce or the production of goods for commerce in an entire industry or substantial part of an industry. Had Congress meant to confine the application of this statute to situations result-

> ing from industry-wide strikes it is reasonable to suppose that it would have used language better adapted to that end. By using 'affects' instead of some more confining word as regards the strike or lock-out which might be enjoined it made, we think, the test of applicability not merely the extent of the strike within an industry but the extent of the effect of a strike upon an industry and the national health or safety." 202 F. 2d at 137.

Petitioners' arguments have thus been considered and categorically rejected by the Second Circuit some fourteen years ago. The intervening Congresses spanning this period have not sought by legislation to overrule this interpretation of the law.

Petitioners' attempt at this late stage to marshall legislative history in support of its contention discloses nothing that is definitive. The pre-Taft-Hartley history cited by petitioners is quite inconclusive and produces no clarification of the statutory text. Moreover, it largely antedates the final conference report dated June 3, 1947, in which the proposed national emergency strike provisions were changed from applying only where an entire industry was affected to where an entire industry "or a substantial part thereof" was affected. Thus, the legislative history on the point prior to the conference report naturally focuses around industry-wide or national strikes.

After the conference report, the legislative history clearly shows an awareness by Congress of the fact that the application of the national emergency provisions had been substantially broadened by the addition of the words "or a substantial part thereof." The remarks of Senator Pepper quoted in petitioners' brief (p. 27) show this awareness, and the continuation of

his remarks points up even more graphically the change wrought in the conference report:

> "But here, again, the conference report is not satisfied with protecting against a strike in a case where an entire industry is affected, but the conference report contains the words 'or a substantial part thereof'. Who will determine that question, Mr. President? It would not have to be a strike in the entire automobile industry, but it could be a strike against only one of the large manufacturers. A strike affecting any substantial part of such an industry, as construed by the Board or court, would be sufficient to permit application of this drastic provision for government procedure by injunction, thus again making it a little easier to evade the provisions of the Norris-LaGuardia Act and to obtain injunctions against workers. . ." 93 Cong. Rec. 6679, 2 Leg. His. 1598 (June 6, 1947).

The after-the-fact legislative discussions sought to be utilized by the petitioners suffer even graver infirmities. The fact is that the dialogue quoted by petitioners related to the plant seizure bill (S. 2999, 82nd Cong., 2d Sess., 1952), which was defeated in Congress. Petitioners have quoted excerpts from the hearings and the Senate Report favoring passage of the legislation, ignoring the opponents' arguments which obviously carried the day. The hearings on the bill were characterized by a running argument between the proponents of the bill, who claimed that the Taft-Hartley provisions for handling emergency strikes were inadequate, and the opponents of the bill who claimed they were adequate.[4] Under these conditions,

---

[4] Hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82nd Cong., 2d Sess., on the National Emergency Labor Disputes Act (S. 2999) (1959), pp. 268, 271, 425, 674, 706.

anything that was said must be taken with a grain of salt. At any rate, the issue was settled in favor of the bill's opponents who challenged the specific argument that the language of the Taft-Hartley Act could not apply to a strike in a relatively small but vital defense plant.[5] Properly assessed, the post-legislative history may be damaging to petitioners' argument. It may just as well be taken to reflect the judgment of Congress that the national emergency provisions of Taft-Hartley were adequate to cover the situation, as found shortly thereafter by the Court of Appeals in *American Locomotive*.

---

[5] "*Senator Humphrey:* What do you think about the Taft-Hartley law rather specific provisions? It says that it affects a whole industry or a substantial portion thereof . . .

* * * * *

"It is the same old case that I go back to again. Here is somebody who makes a little resistor, let us say, for a part of electrical equipment that is needed in a particular gadget or particular defense material.

"*Mr. Alfino* (Assistant Manager, Labor Relations, Chamber of Commerce of the United States): The essential test is: Do we have a national emergency?

"Once we apply the test and the answer comes out 'yes', then we apply the Taft-Hartley law. That is what was intended.

"*Senator Humphrey:* The test in the Taft-Hartley law is different.

"*Mr. Barton* (Manager, Labor Relations, Chamber of Commerce of the United States): The statute says 'affecting an entire industry or substantial part thereof.' As to the incident you cite, where some little gadget is vital to some larger item, I do not think we can say for sure that that would not be something affecting a substantial part of an entire industry. Maybe it would." Hearings before the Subcommittee on Labor Relations, of the Senate Committee on Labor and Public Welfare, 82nd Cong., 2d Sess., on the National Emergency Labor Disputes Act (S. 2999) (1952), p. 719.

Petitioners' argument on legislative history was also answered by the Court in *American Locomotive*. There, the Court said:

> "Reliance is put upon what is urged to be adequate legislative history to show that Congress intended the injunctive provisions of §208 to apply only to strikes of a substantially industry-wide scope and not to those of a local character such as this one. Such history does show that the danger to the national health or safety resulting from industry-wide strikes was one of the things which led to the passage of the Act, but it is by no means clear that it was the intention of Congress to limit its scope to such a situation. We find no report of a legislative committee in charge of legislation which finally emerged as the [Act] which so interpreted it; and, though some members of Congress may have indicated that their primary concern was with the evils flowing from industry-wide strikes, we do not find legislative history which warrants attributing to Congress an intention to make that the sole basis for reviving to some extent the jurisdiction which the district courts had in labor disputes before the effective date of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101-115." 202 F. 2d at 137.

In applying the substantial part of an industry standard, the lower courts, as petitioners' review of the twenty-six cases shows, have uniformly followed the *American Locomotive* opinion.

2. The Existence of a Military Aircraft Engine Industry.

Petitioners question the existence of a military aircraft engine industry and would substitute a different and somewhat larger industry known as the "aircraft engine and parts" industry, which would include both military and commercial production. The statute sets no guide as to what constitutes an industry. It clearly

does not, as petitioners appear to argue, adopt the classification of industries designated in the Standard Industrial Classification system.[6] The statute, on the contrary, by its general phraseology, gives wide latitude to the determination of the confines of the industry affected by an emergency-creating strike. There is no justification for the mechanical adoption of any single and rigid classification system for determining, as the emergency arises, the identity of the industry affected by the strike. In an interrelated and complex productive system, this would lead to incongruous results.

The President, the District Court and the Court of Appeals concurred in their finding that there exists an identifiable military aircraft engine industry. As the Court of Appeals found, this aspect of the inquiry presented "only minimal difficulties," stating:

> "That there is in this country a tangible commitment of extensive resources of capital, technological skill, and manpower to the building of aircraft engines designed for use in military aircraft is evident from this record, especially when read with the common sense that should inform the judicial process as any other. The President, in using this term, was not devising an imaginary construct, nor was the District Court." (Slip Opinion, pp. 5-6).[7]

---

[6] A system of classifying groups and subgroups in industries devised by the Office of Statistical Standards of the Bureau of the Budget.

[7] The Court called attention (Slip Opinion, pp. 5-6, fn. 1) that the petitioners' own affidavits make comparison in percentages between production of engines for civilian use and production for military use, and that the affidavits state that the strike may affect as many as thirteen per cent of the total employees in the combined military and aviation aircraft engine industries. As the Court said:

> "These figures impress us as supporting a discernable difference between military and civilian production."

3. The Strike Affects a Substantial Part of the Military Aircraft Engine Industry.

Petitioners' last point is that there was "a total failure of proof" to establish that the strike affected a substantial part of the military aircraft engine industry (Pet. Br., p. 33). The mere statement of the proposition discloses it as the type of issue this Court has said on countless occasions is not open to review by writ of certiorari.[8] Nevertheless, the petitioners are wrong in the evidentiary point they raise.

Petitioners assume that the emergency strike provisions of the Act contain some kind of rigid quantitative measure for judging whether the strike affects a substantial portion of an industry. But there is nothing in the legislative history to warrant this mechanistic interpretation. A substantial portion of an industry need not be read to mean the greater part of the industry, half of the industry, one-third of the industry, or any fixed percentage of the whole. The use of the term "substantial" rules out an effect which might be *de minimis,* but it encompasses any impact which is tangible, significant and real.

The very fact that the impact of the strike on the military aircraft engine industry has been to create serious production shortages of critical materials which impair the national military effort in Southeast Asia affords a demonstration that the effect of the strike is

---

[8] As stated in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275:

> "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

not illusory but substantial enough to imperil military capability in a vital combat area. When judged against the national defense requirements for military aircraft engines, the effect is substantial indeed.

The fact is that the record shows that the Kokomo plant is the major producer of certain alloys, castings, turbine blades and vanes essential to the production of certain of the most advanced types of aircraft engines and helicopters used in Southeast Asia, and that these materials cannot be obtained anywhere else in time to meet current critical needs. The production of these materials is essential to the continued supply of these vital aircraft. Under these circumstances, the substantiality of the effect of the strike on the military aircraft industry is plainly established.

Before directing the Attorney General to invoke the emergency procedures, the President found that the strike affected a "substantial part of the military aircraft engine industry." (Executive Order No. 11,321, Exhibit B to the Government's complaint). Based upon affidavits filed with the Court, the District Court made an explicit finding that the "strike, if permitted to continue, will affect a substantial part of the military aircraft engine industry." (Findings of Fact and Conclusions of Law of the District Court, Finding No. 9). The Court of Appeals, after argument, affirmed the finding.

These findings were not based on opinion or on speculation or guesswork. They were based on the evidence presented. As the Court of Appeals said, in part:

> "The District Court did not have to find that the 'entire' military aircraft engine industry was affected, but only that a significant segment of it

> was. * * * [I]t is impossible to read what is in this record of the types and functions of the aircraft involved without concluding that their availability in adequate numbers to every branch of the armed services rests upon a resource commitment of a very substantial nature indeed." (Slip Opinion pp. 6-7.)

Petitioners' attack on the Court of Appeals' finding is semantical, attempting to draw a fine distinction between the Court's phrase "substantial commitment of resources", and the statutory text, "substantial part" of an entire industry. (Pet. Br. 35). The Court's opinion, without question, expressly treats with and affirms on the basis of the record the explicit finding of the District Court that the strike affected a substantial part of the military aircraft engine industry.

The emergency strike provisions were enacted almost twenty years ago, and, as petitioners state, the procedures have been invoked a total of twenty-six times. During that period there have been thousands of strikes, many of them affecting an entire industry or significant segments. Many of these strikes have caused extreme public inconvenience. The fact that the emergency procedures have been utilized in only twenty-six strikes should allay any union fears that there has been or will be any overreaching by the government in the invocation of these procedures.[9]

---

[9] In 1966, according to a recent release of the United States Department of Labor (Bureau of Labor Statistics), there were 4,200 strikes, 28 of which involved 10,000 or more workers. (Bureau of National Affairs, Daily Labor Report, No. 6, January 10, 1967).

CONCLUSION

The petitioners are seeking in this case to import highly artificial restrictions into the statutory requirement that the strike in question affect a substantial portion of an industry, in the same manner as the petitioner in *United Steelworkers* v. *United States, supra,* attempted, without success, to restrict artificially the concurrent statutory criterion of peril to the national health or safety. There the union argued that while the entire steel industry was affected, only a small percentage of the productive capacity of the industry was committed to the production of items critical to the national safety, and, therefore, that there should be a selective rather than blanket application of the statute limited in scope to meet the national need and imposing the least restraint on the right to strike. That, in effect, is what the Government has done here. There were eleven Union Carbide plants on strike, but the injunction is limited to the plant whose production is essential to military needs.

In sustaining the ability of the Government to meet national emergencies through the injunctive provisions of the Act, this Court noted in the *Steelworkers* case that "the statute was designed to provide a public remedy in times of emergency" (361 U.S. at 43). And, the concurring opinion of Mr. Justice Frankfurter clearly saw that the "evidentiary burdens" which the petitioner sought to place on the Government "would tend to cripple the designed effectiveness of the Act" (361 U.S. at 52). Based on these considerations, this Court set the bounds of judicial involvement at "finding, upon the evidence adduced, whether a strike or lockout meets the statutory conditions of breadth of in-

volvement and peril to the national health and safety" (361 U.S. at 41).

The courts below have discharged this function. The petitioners now quarrel with the courts' application of the evidence to the statutory criteria. As shown above, the application was reasonable and the lower courts' conclusions were based on evidence adduced. This issue is not one warranting the grant of a writ.

Respectfully submitted,

GUY FARMER

JOHN A. MCGUINN
PATTERSON, BELKNAP, FARMER & SHIBLEY
1120 Connecticut Avenue, N.W.
Washington, D. C. 20036

WILLIAM C. TREANOR
270 Park Avenue
New York, New York

Attorneys for Respondent Union Carbide Corporation

LIBRARY
SUPREME COURT, U.S.

No. 966

Office-Supreme Court, U.S.
FILED
JAN 18 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
AND ITS LOCAL UNION 2958,

Petitioners,

v.

UNITED STATES OF AMERICA
AND
UNION CARBIDE CORPORATION,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

BERNARD KLEIMAN
10 South LaSalle Street
Chicago, Illinois

ELLIOT BREDHOFF
MICHAEL GOTTESMAN
GEORGE COHEN
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

NATHAN LIPSON
ALFRED LAWSON
1500 Commonwealth Building
Pittsburgh, Pa. 15222

Attorneys for Petitioners

IN THE

Supreme Court of the United States

October Term, 1966

No. 966

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
AND ITS LOCAL UNION 2958,

Petitioners,

v.

UNITED STATES OF AMERICA
AND
UNION CARBIDE CORPORATION,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

1. The Government's brief in opposition illustrates, we believe, a principal reason why the Court should grant certiorari: the apparent belief of the Government that it can cajole the courts into issuing "national emergency" injunctions without proving both statutory prerequisites.

Congress did *not* intend the injunction provisions to be applicable to every strike imperiling the national health or safety. It limited their availability to certain kinds of strikes, those affecting "an entire industry or a substantial part thereof". Section 208(a)(i). And, in *Steel Industry*,[1] this Court held that the Government must prove "upon the evidence adduced" that both statutory prerequisites are met.

In the lower courts, the Government made no attempt whatsoever to meet the "industry" requirement. It submitted an affidavit of Deputy Secretary Vance, simply asserting the statutory conclusion (R. 19), and it argued that

[1] *United Steelworkers* v. *United States*, 361 U.S. 39 (1959).

"The strike to be enjoined need not be industrywide if, in fact, it imperils the national health or safety." (R. 29).[2]

In this Court, the Government has grown bolder. It wishes to repair its evidentiary failure. And, to do so, it indulges in a blatant distortion (Brief in Opposition, p. 6):

> "Petitioners conceded, as the court of appeals pointed out, 'that the strike in issue may affect as many as 16,500 workers, representing 13% of the total industry' [i.e., the entire aircraft engine industry, including the military aircraft engine industry.]"

Petitioners conceded no such thing. In the face of the Government's failure of proof, petitioners might have rested. Instead, petitioners attempted to demonstrate how insubstantial a part of the aircraft engine industry was affected by the strike at the Kokomo plant. To this end, the affidavit of Wise Stone was submitted. This affidavit recited that the three plant making engines needing the Kokomo plant's products have a *total* employment of 16,500 (R. 53); that these plants manufacture items other than the engines affected by this strike (R. 52); that "many of these employees . . . are engaged in the manufacture of other items than the military aircraft engines involved in this case" (R. 53); that the employment figures for these plants, therefore, *greatly exaggerate the number of employees engaged in the manufacture of military aircraft engines at those plants* (R. 52); that, while total employment at these plants constitutes 13% of total employment in the industry, "this 13% includes an undetermined number of employees engaged in the manufacture of civilian aircraft engines and engine parts and other engines and parts designed for military use", and that "*the percentage* of the employment in the entire aircraft engine and engine parts industry which is *engaged in building the particular military engines which are involved in this*

[2] The Government's failure of proof was all the more revealing, for petitioners had put it on notice, 24 hours before the hearing, that they intended to assert that the "industry" requirement was not met.

case is obviously much smaller." (R. 53-54). (Emphasis added).

A similar misstatement appeared in the opinion of the Court below, (App. 42-43, n. 1). However, it did not appear in the portion of the opinion finding that the strike "affects a substantial part" of the industry, and it is therefore clear that the court below did not rely upon it in making that finding.

2. In a further effort to shore up the "substantial part of an industry" finding, the Government relies on the President's "finding" to the same effect. We have already noted that the President made no such "finding"; that his Executive Order states only his "opinion"; and that this Court has required that findings of fact be judicially made, "upon the evidence adduced", (Pet. pp. 19-20, n. 10).

The Government's persistent attempts in these Taft-Hartley cases to make the Executive Order a "finding" which will substitute for evidence has been criticized. Jones, *The National Emergency Disputes Provision of the Taft-Hartley Act,* 17 Western Reserve L. Rev. 133, 221-222, and n. 316, 318 thereat.

Nor can support for this practice be garnered from *Steel Industry.* There, the Court's opinion did not rely on the alleged "findings" of the President. While it is true that the concurring opinion of Justices Frankfurter and Harlan relied upon the President's opinion with respect to peril to the national safety, they did so because the President "is, after all, the ultimate constitutional executive repository for assuring the safety of the nation." 361 U.S. at 48. However, no similar expertise may be attributed to the President when it comes to determining whether the strike affects a "substantial part of an industry", for this is not a matter uniquely entrusted to his competence.

The Government's uniform reliance on the President's Executive Order as a "finding" is a further device designed to obliterate the "industry" requirement. Had the Court

below relied upon the President's "opinion" as a "finding," this would have constituted still an additional reason for review by this Court.

Respectfully submitted,

BERNARD KLEIMAN
10 South LaSalle Street
Chicago, Illinois

ELLIOT BREDHOFF
MICHAEL GOTTESMAN
GEORGE COHEN
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

NATHAN LIPSON
ALFRED LAWSON
1500 Commonwealth Building
Pittsburgh, Pa. 15222

Attorneys for Petitioners